COMMENT

THE AFTERMATH OF *WHDH*: REGULATION BY COMPETITION OR PROTECTION OF MEDIOCRITY?

On January 22, 1969, the Federal Communications Commission adopted a decision that will ultimately result in a major alteration of the law governing the renewal of commercial radio and television broadcasting licenses. For the first time in its thirty-five year history, the FCC refused to renew the license of a broadcaster who had an "average" record of performance, and awarded the frequency to one of the parties that had challenged the licensee.[1]

The reaction of the industry and the communications bar was immediate. They persuaded the Commission to establish a "cut-off" date for filing applications competing with renewal applications.[2] More significantly, the National Association of Broadcasters initiated a campaign among its membership for the passage of a bill by Congress to prevent the FCC from considering competing applications when acting on the renewal application of a licensee.[3] The lobbying campaign

[1] WHDH, Inc., 16 F.C.C.2d 1 (1969), *appeals docketed,* No. 23514, D.C. Cir., June 16, 1969, No. 23159, D.C. Cir. June 17, 1969.

[2] *In re* Amendment of §§ 1.580, 1.227, 1.516, 1.571 and 1.591 of FCC Rules, 34 Fed. Reg. 7964, 16 P & F RADIO REG. 2d 1512 (1969).

The amendment of the Commission's rules established a "cut-off" date 30 days prior to the expiration date of the renewal applicant's license. Both competing applications and petitions to deny must be filed before the "cut-off" date. This not only permits the Commission's staff to continue its statutorily-permitted practice of granting renewals within the month preceding the expiration date but also eliminates the possibility of filing competing applications after a renewal application has been deferred for further investigation. Lengthy deferrals may indicate that the Commission has uncovered evidence of unsatisfactory past performance or is skeptical of the renewal applicant's future performance. Competing applicants would prefer to file against such licensees and were able to do so prior to the amendment of the FCC's rules. For example, a competing application was filed against KNBC-TV, NBC's wholly-owned station in Los Angeles, two months after KNBC's license expired because the Commission had deferred the renewal pending further consideration of incidents involving certain NBC shows and KNBC news coverage.

The pressure exerted by the industry on the Commission is evidenced by the fact that the Commission adopted the cut-off rule only two months after it was proposed. *See* Notice of Proposed Rulemaking, 16 F.C.C.2d 858 (1969). Also, the industry convinced the FCC to increase the amount of time between the cut-off date and the expiration date from the proposed 15 to 30 days prior to the license expiration date.

[3] The bill proposed by the NAB provides for the amendment of § 309(a) of the Communications Act of 1934, 47 U.S.C. § 309(a) (1964), by adding the following language:

> Notwithstanding any other provision of the Act, the Commission, in acting upon any application for renewal of license filed under section 308, may not consider the application of any other person for the facilities for which renewal is sought. If the Commission finds that the public interest, convenience, and necessity would be served thereby, it shall grant the renewal application. If the Commission determines after hearing that a grant of the application of a renewal applicant would not be in the public interest, convenience, and necessity, it may deny such application, and applications for construction permits by other parties may then be accepted, pursuant to sec-

was so effective that by the time that the Commission acted on the requests for rehearing by the parties in *WHDH*,[4] over fifty separate, but virtually identical bills, had been introduced into the House of Representatives by over fifty-five Congressmen.[5] On the Senate side of the Capitol, Senator Pastore, Chairman of the Communications Subcommittee and the most influential member of either house in broadcasting matters, introduced a slightly modified version of the bill[6] "to remove the sword of Damocles from over the heads of licensees at renewal time."[7]

Events since the initial decision in *WHDH* have shown that the industry's concern over the sudden shift in regulatory policy is well-founded. For example, a hearing examiner recommended that a major Los Angeles television station's renewal be denied and that the license be awarded to a competing applicant.[8] No fewer than three other major stations in the largest markets in the country have been challenged by competing applicants: KNBC-TV, Los Angeles; WPIX-TV, New York City; and WNAC-TV, Boston.[9] Furthermore, the renewals of two newspaper-owned television stations have been designated for hearing.[10] In addition, the Justice Department settled its first antitrust suit against a newspaper-television combination[11] by requiring the de-

tion 308, for the broadcast service previously licensed to the renewal applicant whose renewal was denied.

See, e.g., H.R. 11376, 91st Cong., 1st Sess. (1969) (introduced by Rep. Purcell).

[4] WHDH, Inc., 17 F.C.C.2d 856 (adopted May 19, 1969).

[5] 115 CONG. REC. H 2591-H 3754 *passim* (daily eds. April 14 to May 15, 1969).

[6] S. 2004, 91st Cong., 1st Sess. (1969). For the text of the bill see text accompanying note 114 *infra*.

[7] 115 CONG. REC. S 4228 (daily ed. April 29, 1969).

[8] RKO General, Inc. (KHJ-TV), 16 P & F RADIO REG. 2d 1181 (1969) (initial decision of Hearing Examiner Thomas H. Donahue).

[9] These three stations exemplify the types of stations most vulnerable to attack by competing applicants. All three are in the lucrative top ten markets and all are VHF outlets. KNBC-TV, owned and operated by the NBC network, is undoubtedly one of the most profitable outlets in the country. According to FCC statistics, the 15 television stations owned and operated by the networks earned over a quarter of the aggregate net income of all the 486 VHF stations operating in 1967. 34 FCC ANN. REP. 122 (1968). As KNBC is in the second largest market in the country, it earns considerably more than even the average network owned-and-operated station.

WPIX-TV, owned by the New York Daily News, although not the most profitable station in the New York market, has a tremendous business potential, since it is one of the six VHF stations in the most lucrative market in the country and has greater coverage than any other station in the market.

In addition to network- and newspaper-owned stations, stations owned by conglomerates such as RKO General's Boston station, WNAC-TV, are also vulnerable. RKO General is a wholly owned subsidiary of General Tire & Rubber Company. Although perhaps not as profitable as a New York or Los Angeles station, WNAC-TV is particularly vulnerable to renewal denial because of evidence of certain anticompetitive trade practices between General Tire and its subsidiaries on the one hand and General Tire's suppliers and purchasers on the other. RKO General, Inc. (KHJ-TV), 16 P & F RADIO REG. 1181, 1241-60 (1969) (initial decision of Hearing Examiner Thomas H. Donahue).

[10] Midwest Radio-Television, Inc. (WCCO & WCCO-TV), 16 F.C.C.2d 943 (1969); Chronicle Broadcasting Co. (KRON-FM & TV), 16 F.C.C.2d 882 (1969).

[11] The defendant, Gannett Company, agreed to sell its Rockford, Illinois television station to meet the Justice Department's demands. Gannett owns the two newspapers in Rockford. BROADCASTING, Sept. 1, 1969, at 9.

fendant to divest itself of the station, further indicating its concern about the concentration of control of the media.[12]

These developments have created a state of confusion and flux. On the one hand, Congressmen under the pressure of powerful broadcasting interests in their constituencies are pushing for prompt passage of legislation to curtail the FCC's power to deny renewal. On the other, reformers hail the Commission's belated realization that a license is not a perpetual property right.[13] Meanwhile, hearing examiners must prepare to preside over comparative hearings between original and renewal applicants for which the FCC has provided them with few guidelines. The situation calls for an evaluation to ascertain which of the principal proposals for reform of the license renewal process would best serve the public.

To begin such an evaluation, it will first be necessary to describe the inadequacies of present license renewal proceedings. The second step will be an analysis of the law relating to the standards applicable to comparative hearings in renewal proceedings, of the impact of the *WHDH* decision, and of its potential for injecting a much needed element of competition into the renewal process. Current legislation to overrule *WHDH* will then be examined, and finally, a proposal will be offered to minimize the danger which this legislation is intended to remove—insecurity of investment in the broadcasting industry.

I. The Renewal Problem

The Communications Act of 1934 limits broadcasting licenses to terms of three years and provides for subsequent renewals for similar periods "if the Commission finds that public interest, convenience, and necessity would be served thereby." [14] Although the portion of the Act which deals specifically with broadcast licenses is relatively short, it contains two explicit statements that the licenses granted confer no rights on the licensees beyond the terms and conditions of the license,[15] and two explicit mandates that renewal be contingent upon the Commission's finding that the public interest would be served by the grant.[16]

That license renewal was not intended by Congress to be automatic is amply demonstrated by the fact that the provisions relating to renewal in the Communications Act were adopted with only minor alteration from the Radio Act of 1927. Under that Act the Federal

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[12] *See* Comments of the United States Department of Justice (brief submitted in rulemaking), *In re* Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, No. 18110 (F.C.C., proposed March 28, 1968) proposing that licensees with more than one broadcast license or a newspaper in a market be required to divest themselves of all but one of their media interests.

[13] *See, e.g.*, Shayon, *Who Will Cry Havoc?*, Saturday Review, June 28, 1969, at 22.

[14] 47 U.S.C. § 307(d) (1964).

[15] 47 U.S.C. §§ 301, 309(h) (1964); *cf.* 47 U.S.C. § 304 (1964).

[16] 47 U.S.C. §§ 307(d), 309(a) (1964).

Radio Commission (FRC) in one year alone threatened to deny renewal of 164 station licenses, and eventually denied 62 of them.[17] Despite the FRC's aggressive posture in renewal proceedings, the congressional reports expressed concern about the danger of its losing control over the valuable privileges conferred.[18]

The FCC's behavior has been very different from that of its predecessor. Despite the statutory mandate, its practice, particularly in the past two decades, has been to grant renewals automatically unless there is substantial evidence of misrepresentation to the Commission, falsification of program logs, obscene programming, sponsorship of unlawful lotteries or other clear violations of the Commission's rules.[19] In fact, for a quarter of a century, the FCC granted all applications for renewal except in the case of technical defects or misrepresentations to the Commission.[20] Although the Commission since 1961 has been more prone to penalize miscreants, license renewals are essentially automatic in the absence of gross misconduct or flagrant violation of a clear FCC rule.[21]

A. *The Mechanics of Renewal*

The initial responsibility for the grant of a license renewal has been delegated to the Chief of the Commission's Broadcast Bureau.[22] In practice, the Chief grants all renewal applications which comply with the statute, regulations, and Commission policy, and which do not conflict with any other application, or against which no petition to deny has been filed. All but an extremely small fraction of renewal applications are granted without any review by the Commission or any of

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[17] 2 F.R.C. ANN. REP. 16 (1928).

[18] *See* S. REP. No. 781, 73d Cong., 1st Sess. (1933), reprinted in P & F RADIO REG. (Current Service) ¶ 10:1004, at 10:227 (suggesting that license terms be shortened to maintain control over the license privileges); H.R. REP. No. 1918, 73d Cong., 1st Sess. (1933), reprinted in P & F RADIO REG. (Current Service) ¶ 10:1019, at 10:264 (renewal grants should be made pursuant to the same considerations as initial grants). The latter proposal was incorporated into the original Act, but was amended in 1952 because Congress deemed the considerations applicable to the two types of grants to be somewhat different. Both the legislative history and the Commission interpretation of the statute as amended demonstrate that the 1952 amendment did not restrict the Commission's power to deny license renewals. *See* KSTP, Inc. (KOB), 22 P & F RADIO REG. 35 (1961).

[19] JONES, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION (1962), reprinted in *Hearings on the Federal Communications Commission, Part I, Before Subcomm. No. 6 of House Select Comm. on Small Business,* 89th Cong., 2d Sess., A87, A152 (1966) [hereinafter cited as JONES].

[20] Cox, *Does the FCC Really Do Anything?* 11 J. BROADCASTING 97, 104 (1967).

[21] The following table shows the number of renewal applications for radio and television stations set for hearing by the FCC in each fiscal year:

1958 — 2	1962 — 13	1966 — 16
1959 — 3	1963 — 13	1967 — 6
1960 — 21	1964 — 8	1968 — 15
1961 — 5	1965 — 16	

Most of the applications were designated for hearing because of evidence of misrepresentation. FCC ANN. REP. (1958-1968).

[22] 47 C.F.R. § 0.281(a)(1) (1969).

its members.[23] The processing, analysis, and investigation of the roughly 2,400 renewal applications received annually[24] is the responsibility of the Renewal Branch, which consists of six lawyers, five broadcast analysts, three engineers, and two accountants, plus a clerical staff.[25] Each application is reviewed initially by an accountant, a broadcast analyst, and an engineer, who are primarily concerned with the financial status of the licensee, possible legal or character issues, the actual and proposed programming, and defects in transmission. Letters of inquiry are sent to those stations which have submitted applications which are incomplete, defective, or require further elaboration. At the initial processing stage, a report on a licensee's shortcomings from the Complaints and Compliance Division may also be considered, to determine if further investigation is required. Usually, the Complaints Division report enumerates the complaints filed by a station's listeners with the Commission and the station's response to any complaint forwarded to the licensee by the Commission. If an investigation is warranted or if the renewal applicant has not satisfactorily answered an inquiry, his renewal may be deferred and not renewed prior to the expiration date of the previous license.[26] But deferral does not necessarily imply that the renewal is in jeopardy. Generally, deferred status merely indicates a minor, usually technical, defect in the application.[27]

The officials who process renewal applications do not suffer from any dearth of information. The renewal application[28] itself requires the applicant to divulge a substantial amount of information about the operation of his station. The applicant must disclose his financial situation and the businesses and/or stations in which the applicant and its officers, directors, and principal shareholders have an interest. But most revealing is section IV of the application—the "Statement of Program Service." In this section, the applicant must relate his methods of

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[23] The Commissioners themselves play almost literally no role at all. We simply note that the staff has completed its processing of the applications, doing little more than nod to the sketchy memoranda as they pass our desks.

Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study—A statement by Commissioners Kenneth A. Cox and Nicholas Johnson on the occasion of the FCC's renewal of the licenses of Oklahoma broadcasters for a 3-year term beginning June 1, 1968, 14 F.C.C.2d 1, 9 (1968) [hereinafter cited as Oklahoma Study].

[24] According to FCC regulations, all broadcast licenses in a region (usually two or three states) expire on the same date. A schedule has been established whereby every two months a different region's licenses expire, so that each year approximately one-third of all the broadcast licenses are up for renewal. 47 C.F.R. §§ 73.34, 73.218, 73.630 (1969).

[25] *Inside the FCC: The Renewal Branch*, TELEVISION AGE, August 25, 1969, at 72.

[26] JONES at A151-53.

[27] Joint Comments of KFMB (AM)-FM-TV (Brief submitted by Covington & Burling) at 6-7, *In re* Amendment of §§ 1.227, 1.516, 1.571 and 1.591 of FCC Rules, 34 Fed. Reg. 3694, 16 P & F RADIO REG. 2d 1512 (1969) (Docket No. 18495).

[28] FCC Form 303 (adopted Sept. 1967).

ascertaining the community's needs and interests,[29] the needs and interests he believes his station will serve in the future, the typical programs that he plans to broadcast in the next license period, and the procedures he has for the consideration of complaints from the public. Past programming is described by detailing the programming of a "composite week"—seven days throughout the year which are designated by the Commission.[30] The applicant must report the amount of time devoted to news, public affairs, and other non-entertainment programming, as well as the sources of the programming for the week—local, network, or recorded—and the number of public service announcements broadcast in the composite week.[31] In addition, more general inquiries are made concerning the programming broadcast to serve the interests and needs of the community, the size of the news staff, and the applicant's policy with respect to appropriation of time for the discussion of public issues.

The applicant is then asked to classify a typical week of his proposed programming by program types and sources, and to indicate changes in programming or policy from the prior license period. He must also indicate the amount of commercial matter per hour in the composite week for the past, and the maximum amount he proposes for the future. Obviously, the Commission requires the applicant to divulge

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[29] Since Suburban Broadcasters, 30 F.C.C. 1021 (1961), the Commission has required that applicants provide complete information about their awareness of the interests and needs of the community they serve and their efforts to meet those needs and interests. In Public Notice Relating to Ascertainment of Community Needs By Broadcast Applicants (FCC 68-847), 33 Fed. Reg. 12113, 13 P & F RADIO REG. 2d 1903 (1968), the Commission enumerated four elements that it seeks in answers to part I of section IV of the application:

a) Ascertainment of community needs by consultations with community leaders,

b) A listing of the significant suggestions as to community needs received from consultation with community leaders.

c) The applicant's evaluation of the relative importance of those suggestions as to community needs and his consideration of them in formulating the station's overall program service.

d) Relating the program services to the needs of the community as evaluated—a showing in the application of "*what* program service is proposed to meet *what* needs." *See* City of Camden, 18 F.C.C.2d 412, 418-22 (1969). It is important to note that the Commission's emphasis is not on audience programming preferences, but on the problems and issues within the community. Broadcasting Service of Carolina, Inc., 16 F.C.C.2d 591 (1969).

[30] *See, e.g.,* Public Notice 34980, (FCC 69-856), 34 Fed. Reg. 13048 (1969); Public Notice 20961 (FCC 68-831), 33 Fed. Reg. 11863 (1968).

[31] The following are brief definitions of the principal program types and sources:

a) News—reports dealing with current local, national and international events;

b) Public affairs—talks, commentaries, documentaries and similar programs concerning local, national and international affairs;

c) Non-entertainment—used in this Comment to refer to all programming except entertainment and sports;

d) Local—any program originated or produced by the station in which local talent is employed;

e) Network—programs furnished by a network;

f) Recorded—syndicated, taped or transcribed programs and feature films;

g) Public service announcement—any announcement for which no charge is made and which promotes activities or services of a governmental or nonprofit organization. *See* FCC Form 303, section IV-B, at i-ii.

more information than can possibly be entered on the ten-page form. The answers supplied on the form merely refer the reader to the multitude of exhibits which are invariably attached. Renewal applications, especially for television licenses, are voluminous compilations in which substance is often lost in a deluge of trivia.[32]

B. *The Ineffectiveness of the Renewal Process*

The irony of this application procedure, with its elaborate apparatus for gathering and evaluating information, is that in the absence of major complaints, rule violations, or gross misconduct, the renewal will be granted,[33] unless a petition to deny or a conflicting application has been filed with the Commission.[34] Applications which show an inadequate survey of community interests or which propose a high concentration of commercialization [35] may be deferred and investigated, but the chances of adverse Commission action are slight and the prospects of denying renewal virtually nil. In some areas, notably programming, the Commission has essentially abdicated its responsibility to direct its staff. Although the Commission requires the staff to submit reports on those stations that propose less than five percent news, one percent public affairs, and five percent non-entertainment

[32] For example, there seems to be a tendency for applicants to submit extremely long lists of community leaders interviewed without an in-depth analysis of the opinions expressed in the interviews and, usually, with little apparent effect on the station's programming. Meritorious programming is often described in several different sections of the application. Perhaps this is the result of the size of the application: applicants fear that the FCC staff will overlook the instances of outstanding performance buried in the application, and therefore refer to them at every opportunity.

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> I think that what has happened is that, as the majority of the Commission has become more permissive—in part because of their great concern about the first amendment, censorship, and intervention in programming—that the feeling has gotten around that the Commission isn't going to do anything about your license renewal unless you violate a clear rule, or you cheat somebody, or you lie to the agency, or something like that.

Hearings on Review of Policy Matters of Federal Communications Commission Before the Subcomm. on Communications of the Senate Comm. on Commerce, 91st Cong., 1st Sess., pt. 1, at 122 (1969) (testimony of Commissioner Cox).

[34] The Commission itself must act upon a petition to deny, although a hearing is not required if no substantial or material questions of fact are raised by the petition. 47 U.S.C. § 309(d)(2) (1964). Mutually exclusive applications require that a comparative hearing be held. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); KSTP, Inc. (KOB), 22 P & F RADIO REG. 35 (1961).

[35] The Commission has established general guidelines with regard to these matters. *See* note 29 *supra;* Public Notice, Statements of Proposed Commercial Practices (FCC 66-923), 31 Fed. Reg. 13875 (1966) (which required applicants who proposed more than 18 minutes of advertising per hour for radio or more than 16 minutes per hour for television to state the basis on which they concluded that such practices "would be consonant with the needs and interests of the community which the licensee serves").

The Commission appears to be increasingly concerned that broadcasters at least follow the procedures of the *Suburban Broadcasters* rule, *cf.* City of Camden, 18 F.C.C.2d 412, 418-22 (1969); Broadcasting Service of Carolina, Inc., 16 F.C.C.2d 591 (1969), but it is obvious from all recent studies that many licensees give little, if any, consideration to the community survey in formulating their programming. And overcommercialization has not precluded renewal. *E.g.,* Accomack-Northampton Broadcasting Co., 8 F.C.C.2d 357 (1967) (the applicant proposed as much as 33 minutes of commercial matter per hour).

programming, the staff regularly renews the licenses of many stations with proposals for considerably less program time in one or more of these classifications.[36]

Nevertheless, this does not mean that the typical licensee's programming and policies are unaffected by the periodic ritual of renewal. There is considerable evidence that many renewal applicants attempt to present past and proposed programming which meets the minimal guidelines followed by the FCC staff in processing renewal applications[37] and which is geared to the predilections of the Commission.[38] This practice is certainly understandable in view of the enormous value of the broadcast franchises and the total absence of any concrete Commission formulations fixing the minimal quantity of non-entertainment programming and the maximum quantity of commercialization.[39] The

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[36] The refusal of the majority of the Commission to direct its staff to ask the broadcasters for their reasons for such low amounts of news, public affairs or non-entertainment programming has prompted Commissioners Cox and Johnson to issue bimonthly dissents. *See, e.g.*, Renewal of Radio and Television Licenses in New York and New Jersey, 18 F.C.C.2d 268, 322 (1969); Oklahoma Case Study, 14 F.C.C.2d 1, 126 (1968); Renewal of Standard Broadcast and Television Licenses, 11 F.C.C.2d 809, 810 (1968). The Commission has found a proposal providing for no news or public affairs programming to be in the public interest. Herman C. Hall, 11 F.C.C.2d 344 (1968).

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> The review of renewal applications does proceed against standards. They are assumed standards with a heritage of uniformity dictated only by tradition.
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> What are the traditional standards? These are difficult to ascertain. There is no form book or check list which encompasses them. Regulating the most technologically advanced form of communication yet devised by man is a body of imperatives which have survived through man's most primitive form of communication—the oral tradition. Difficult to characterize, these standards are neither rule nor regulation. They are more in the nature of mores.

STAFF OF SUBCOMM. ON COMMUNICATIONS OF SENATE COMM. ON COMMERCE, 90TH CONG., 2D SESS., FAIRNESS DOCTRINE 78 (Comm. Print 1968).

[38] JONES at A171-72. Processing the application for renewal also allows the Commission to compare the applicant's past promises with his past performance. Gross disparity between his past promises and performance may be grounds for a hearing, *cf.* Fisher Broadcasting Co., 30 F.C.C. 177 (1961), or disciplinary action. KORD, Inc., 31 F.C.C. 85 (1961).

Since previous promises, especially if contained in an original application, were attuned to the desires of the Commission in order to facilitate processing or to gain an advantage in a comparative hearing, requiring conformity with past promises exerts an influence on the licensee to follow the predilections of the Commission. At the same time, however, it introduces an element of rigidity into the system by making it less likely that broadcasters will change with the changing conditions of their communities. JONES at A171-72. Commissioner Cox has observed, however, that many broadcasters' programming proposals decline over the years from the proposals approved in the original licensing proceeding. *The FCC's Role in Television Programming Regulation: A Symposium*, 14 VILL. L. REV. 581, 639 (1969).

[39] The history of the FCC's attitude toward overcommercialization at renewal time demonstrates how quickly administrative policy can change. Although in the 1940's the Commission had designated several renewal applications for hearing because of excessive commercialization (80-90% of total broadcast time), all were renewed on the basis of promises to improve. In 1963, Chairman Minnow began his campaign to curb overcommercialization, culminating in a proposed rulemaking to adopt the standards of the NAB Code. Under intense pressure from the NAB and Congress, the Commission decided that the adoption of the rule would be inappropriate but asserted its intention to examine commercialization on a case-by-case basis. The Commission was so deadlocked that it was unable to pursue its policy for almost two years. Suddenly, in a three-month period, the Commission ended its vacillation

avoidance of a letter of inquiry, deferral status, and possibly an investigation is worth enough to the typical licensee that he is willing to conform his programming and station operations to what he and his counsel feel the Commission desires. Thus, most of the regulation of renewal applicants is not overt but is what has been described as "regulation by the lifted eyebrow." [40]

While many broadcasters, if not the overwhelming majority, make a conscious effort to remain in the good graces of the Commission, many licensees have taken advantage of the Commission's reluctance to establish mandatory guidelines in areas such as programming. In the case of KHJ-TV, RKO General's [41] station in Los Angeles, the record showed that the licensee had received renewals despite a programming format devoted almost exclusively to old movies and frequent commercials. In his conclusion, the hearing examiner observed:

> Why [General Tire] chose to thus operate the station is of course a question that is locked in the breast of General Tire's management. A good guess would be that with a myopic eye on the dollar it decided "formula broadcasting" would "get by" because the station would never be called to account.[42] If that was the rationale behind the policy that has brought the station to the brink of loss of license, about the kindest thing that can be said of it is that it evinced considerable naivete concerning the stability of regulatory policy.[43]

Of course, KHJ-TV is an exceptional case. Its inadequacies were probably apparent in the renewal application itself.

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and granted 11 stations short-term renewals for substantial disparities between proposed commercial practices and performance. Ramey, *The Federal Communications Commission and Broadcast Advertising: An Analytical Review,* 20 FED. COMM. B.J. 71, 85-109 (1966).

[40] Miami Broadcasting Co. (WQAM), 14 P & F RADIO REG. 125, 128 (1956) (dissenting opinion of Commissioner Doerfer).

[41] RKO General, a wholly owned subsidiary of General Tire and Rubber Company, owns an AM, an FM, and a TV station in each of 3 of the top 5 markets in the country.

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> The formula referred to is as old as time. There have been many practitioners of it, including Phineas T. Barnum and Texas Guinan. One of its most colorful exponents was the western "medicine man". He rolled into a frontier town, bought a round of drinks for the boys at the bar, gave the Sheriff a couple of cigars, called out Little Sheba and went into his pitch selling his own particular brand of snake oil. Modern broadcast counterpart would call for these changes in casting and properties: Boys at the Bar . . . the so-called "Discriminating Audience"; the drinks . . . news, information and some quality entertainment; The Sheriff . . . The Commission; the cigars . . . the station's nod to the Commission's reporting requirements and program policies. Only nominal changes need be made for Little Sheba and the pitch of the medicine man.

RKO General, Inc. (KHJ-TV), 16 P & F RADIO REG. 1181, 1267 n.3 (1969) (initial decision of Hearing Examiner Thomas H. Donahue) (footnote in original).

[43] *Id.* at 1267-68.

However, in many cases the failure of the licensee to serve the public is not readily apparent from the application since he scrupulously follows the ritual while, in fact, violating the spirit of commission and statutory policy. In such cases, an evidentiary hearing in which representatives of groups in the licensee's community can participate fully is a useful tool in determining the broadcaster's devotion to the public interest.[44] The statute requires such hearings when the Commission is unable to make a finding that a grant of the application would be in the public interest or when there is a material and substantial question of fact.[45] In practice, however, the Commission has granted renewals without a hearing even where listener complaints or community group petitions to deny have raised serious questions of fact.[46] Even when hearings have been held, those attacking the renewal have traditionally been accorded hostile treatment by both the hearing examiners and the Commission. This attitude on the part of the Commission led Judge Burger to write one of the most scathing opinions ever delivered against a federal agency:

> The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.[47]

Competing applicants for licenses held by renewal applicants have been accorded a comparative hearing with the renewal applicant as a matter of right. However, the only decided cases[48] give the existing

[44] Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates.

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).

[45] 47 U.S.C. § 309(e) (1964).

[46] *See, e.g.*, Petition for Reconsideration of Ethel C. Hale and W. Paul Wharton (License Renewal of KSL), 16 F.C.C.2d 340 (1969), *appeal docketed*, No. 22751, D.C. Cir., May 15, 1969; Lamar Life Broadcasting Co. (WLBT), 38 F.C.C. 1143 (1965), *rev'd sub nom.* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); *cf.* Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968).

[47] Office of Communication of the United Church of Christ v. FCC, No. 19,409, at 12-13 (D.C. Cir., June 20, 1969).

[48] Wabash Valley Broadcasting Corp. (WTHI-TV), 35 F.C.C. 677 (1963); Hearst, Inc. (WBAL), 15 F.C.C. 1149 (1951); *cf.* C. Bruce McConnell, 6 F.C.C. 167 (1938).

licensee such an overwhelming advantage, because of the mere fact that he is the existing licensee, that potential challengers have been deterred from filing competing applications.

It is thus clear that the FCC has consistently demonstrated a bias in favor of renewal applicants. Perhaps this is due in some degree to the past failure of the Commission to entertain the complaints and evidence of listener groups as well as to the insufficiency of the Commission's investigative staff. Without evidence of a licensee's failure to serve his community, it may seem unreasonably harsh to the Commission to force him through a long and expensive hearing. But probably the most important reason for the Commission's protective attitude is the severity to the license holders of denying renewal. There is, of course, a range of penalties less severe than revocation or denial to which the Commission can resort: money forfeitures, cease and desist orders, and short-term renewals.[49] The latter has been used by the Commission in situations where it has deemed normal three-year renewal not to be in the public interest. Sometimes, as in *WLBT*, this remedy is employed to give the licensee a probationary period to improve his operation.[50] At other times, grant of a short-term renewal has been conditioned on the sale of the station within the license term, thereby permitting the broadcaster to recover a tremendous profit on the sale of his license.[51] However, none of these lesser sanctions is very effective, especially against gross misconduct, since all of them either leave the licensee in possession of his license,[52] or allow him to make a full profit on the sale of the station.

A further possible reason for the Commission's reluctance to deny renewal is that it may also harm the community as well as the licensee who serves it. A station in a small market with correctable deficiencies may be better than none at all. Furthermore, without a competing application against which to compare the licensee's performance, it is often difficult to determine whether another licensee could be found

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[49] 47 U.S.C. §§ 503(b)(1), 312(b), 307(d) (1964).

[50] *See, e.g.*, Lamar Life Broadcasting Co. (WLBT), 38 F.C.C. 1143 (1965), *rev'd sub nom.* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); KORD, Inc., 31 F.C.C. 85 (1961).

[51] Melody Music, Inc. (WGMA), 2 F.C.C.2d 958 (1966); *cf.* National Broadcasting Co., 37 F.C.C. 427 (1964).

Professor Jaffe feels that the Commission should consider more frequent use of of this remedy, especially in situations in which the licensee initially purchased the license. He admits, however, that such action may be contrary to the statutory scheme, which requires the Commission to make a determination that renewal would be in the public interest, since the primary reason for the special renewal is to allow a broadcaster who has been deemed unqualified to recover his investment in the intangible assets of the station. Jaffe, WHDH: *The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1699-1700 (1969).

[52] A recent decision demonstrates the ineffectiveness of the short-term probationary renewal as a penalty. The Commission found that a licensee operating under a one-year license had fraudulently deceived its advertisers with respect to promotional contests and broadcast times of advertisements. Nevertheless the licensee was granted a six-month renewal. Star Stations of Indiana, Inc., 17 P & F RADIO REG. 2d 491 (1969).

who would perform better.[53] Today, however, these considerations are applicable only in the smaller markets and to certain types of stations (UHF and FM, for instance) in the larger markets. The value of a broadcasting license, especially a VHF license, in the top fifty markets is so great that the Commission could be reasonably certain that a suitable applicant would apply were renewal denied.[54]

The most severe effects of denial of a renewal application would be felt by the broadcasting industry, which has come to rely on automatic renewal. The entire industry is built on investments that cannot be recovered in the initial three years of operation. The licensees which pioneered FM radio, UHF, and color television would not have done so if they had not been certain of renewal. Most stations contract for programming years in advance and secure their best personnel through long-term contracts.[55] The enormous sums paid for licensed stations over and above the replacement value of the station's property are ample testimony to the reliance placed on automatic renewal.[56] These sums represent the potential profit of the station over a period of years which includes several license terms.

Thus, the situation which has developed is something less than satisfactory. The statutory mandate is honored more in its breach than its observance; effective surveillance of broadcast stations is inhibited by the insufficiency of the staff and by the Commission's hostility to local groups and competing applicants; licensees lack incentive to improve their programming and public service above the minimal levels sufficient to avoid minor inquiries and deferral status; and the FCC is unable to depart from its prior practice without serious economic dislocations and opposition from the industry, the public, and the Congress. The result is mediocre and, occasionally, just plain bad programming which gives a nod to the FCC and the public, but bows low to the advertiser's dollar.

II. THE POLICY OF *WHDH*

A. WHDH: *A Break With Precedent*

If *WHDH* revolutionizes communications law, it will be because the policy it enunciated is applicable far beyond the unique facts of the case. The dramatic result—denial of a renewal application—accentu-

[53] For instance, an FM licensee will probably contend that an FM station cannot be operated in the market unless it is affiliated with an AM or TV station. Determining whether that contention is true may require an extensive analysis of the market.

[54] In the *WHDH* case itself, two entirely new applicants filed, both of which were qualified, after the FCC virtually invited applicants to contest WHDH's renewal.

[55] Transcript of Proceedings, vol. 1, at 24-30, *Hearings on S.2004 Before the Subcomm. on Communications, of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969) (testimony of Frank P. Fogarty) [hereinafter cited as *S.2004 Hearings*].

[56] In 1967, a Houston television station was sold for $21.5 million, only 4.5 million of which represented the replacement cost of property and equipment. In 1964, a Pittsburgh television station was sold for $20.5 million, $16.6 million above the replacement value of the property. *S.2004 Hearings*, at 390-91.

ates the general resolve of the Commission, or at least certain of its members, to break with the precedents governing comparative hearings in which a renewal applicant is a party.

Prior to *WHDH*, the Commission followed the policy established by *Hearst Radio, Inc. (WBAL)* [57] and *Wabash Valley Broadcasting Corp.*[58] In 1946, Hearst, the licensee of a standard broadcast station in Baltimore was challenged by the competing application of Public Service Radio Corporation. Five years later, the Commission granted the renewal in a three-two decision. The Commission stated that the determining factor was

> the clear advantage of continuing the established and excellent service now furnished by WBAL and which we find to be in the public interest, when compared to the risks attendant on the execution of the proposed programming of Public Service Radio Corporation, excellent though the proposal may be.[59]

This conclusion is incredible in view of the majority's finding that prior to the designation of the case for hearing, WBAL's programming had been overcommercialized with few programs on local activities. The "established and excellent service" to which the majority refers was due to WBAL's improvement in the period between the designation for hearing and the Commission's decision. Despite the licensee's dubious record, the majority also awarded it a preference [60] for program proposal, and refused to give the challenger a preference for its greater integration of ownership and management, because of the greater probability that Hearst would effectuate its proposals. Similarly, although WBAL was owned by a nation-wide newspaper chain, the majority referred to WBAL's past record as grounds for denying the locally-owned challenger a preference for local ownership. Diversification of ownership—Hearst owned one of the two daily Baltimore papers—was likewise considered not to be a controlling element in view of the licensee's record.

In dissent, Chairman Coy recognized the fact that the manner in which a renewal applicant operated his station must be given significant weight, but considered WBAL's record not sufficiently satisfactory to warrant the inference that it would effectuate its proposals. Both dissenting Commissioners viewed the statutory scheme as providing for competition between a licensee and other applicants at renewal time and thought that the possibility of such competition was the chief incentive for licensees to operate in the public interest.

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[57] 15 F.C.C. 1149 (1951).

[58] 35 F.C.C. 677 (1963).

[59] 15 F.C.C. at 1183.

[60] The word "preference" is a term of art indicating one party's superiority over other competitors on a criterion. The term "demerit" is used to signify that a party has not made a satisfactory showing on one criterion.

The challenger in *Wabash Valley*, unlike his counterpart in *Hearst*, entered the comparative hearing with an outstanding record as an AM radio licensee, but it was made in a different community than the one in which the television station he sought was located. Although the Commission awarded Livesay, the challenger, a preference over Wabash in a comparison of their respective AM radio operations, the majority gave Wabash a preference on the overall criterion of past broadcast record because of Wabash's record both in the television medium and in the city in question. Having determined that Wabash had proven itself in the medium and the service area, the majority could logically conclude that the element of risk inherent in substituting Livesay for Wabash outweighed Livesay's preferences on the integration and diversification criteria.

The majority's decision on its face appears considerably more well-reasoned than *Hearst*. However, Chairman Henry in dissent noted that the programming of Wabash had not been critically analyzed in the comparative hearing since Livesay had tactical reasons for refraining from vigorously attacking Wabash: Livesay hoped that Wabash would be granted a construction permit for another channel in the city thereby leaving Livesay as the sole applicant for the license that Wabash then possessed. Livesay therefore permitted Wabash to substitute its own specially-selected composite week for the FCC-designated composite week which would have reflected the mediocre character of its performance. It is not clear from the opinion whether the majority took into account the fact that Wabash's true record was different from the one presented. But Chairman Henry recognized the implications of the Commission's decision:

> I particularly regret the fact that the majority's decision in this case may hereafter be construed by potential applicants for the same broadcast facilities (or for mutually prohibitive facilities) as those now being used by existing operators so as to discourage such persons from filing applications when the present licenses come up for renewal. These persons should certainly file applications if they believe that they can demonstrate that they could operate stations which would better serve the public interest, convenience, and necessity than do current licensees.[61]

Had the Commission in *Hearst* and *Wabash* actually followed the principle it claimed to be applying—that an existing station with a good operating record should be accorded a preference over a competing applicant because past performance is the best indicator of future performance—the decisions would be sound. In fact, however, the majority applied the principle in such a way that the mere existence of the

[61] 35 F.C.C. 677, 684 (1963).

record, rather than a critical evaluation of its contents, was the determinative factor in the licensee's favor.

In 1965, the Commission issued a *Policy Statement on Comparative Broadcast Hearings*,[62] in an effort to consolidate the many criteria previously considered by the Commission and to clarify the criteria and their relative importance. Two basic objectives of the comparative hearing were enumerated: the best practicable service to the public and the maximum diffusion of control of the media of mass communications. Thus, the diversification criterion, hitherto regarded as one factor among many, was given primary importance. The criteria which related to the determination of the applicant who would provide the best service were consolidated into three basic criteria—integration of ownership and management, proposed programming, and past broadcast record. Integration was transformed into an "umbrella" criterion encompassing the previously distinct factors of full-time participation by the owners of the station in its operation, participation in local activities by the owners, and past broadcast experience of the owners. In an apparent effort to resolve the contradiction between the Commission's efforts to diversify ownership and its according an advantage to initial applicants with past broadcast records, the Commission stated that it would not consider a past broadcast record that was "within the bounds of average performance." Only records which demonstrated "unusual attention to the public's needs and interests" would be granted a preference since average performance was to be expected of all licensees.

The *Policy Statement*, although breaking new ground, was deemed to have relatively little impact in cases involving license renewals. The Commission had noted in the *Policy Statement* itself that the *Statement* was not applicable to the "somewhat different problems" involved in hearings in which a renewal applicant was a party.[63] Even the Commission's decision to apply the *Policy Statement* to the introduction of evidence in renewal cases and to give all parties in such cases an opportunity to present arguments as to the relative weight to be accorded the various criteria [64] was not regarded as a portent of a major change in renewal cases.

Then, in January 1969, a three-man majority [65] in *WHDH* held that the *Policy Statement* was applicable to comparative hearings involving renewal applicants. The vehicle for the Commission's shift in

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[62] 1 F.C.C.2d 393 (1965).

[63] *Id.* at 393 n.1.

Commissioner Hyde in his dissenting opinion observed that there was no rational or legal basis for the *Policy Statement's* purported nonapplicability to comparative hearings involving renewal applicants. *Id.* at 403.

[64] Seven (7) League Productions, Inc. (WIII), 1 F.C.C.2d 1597 (1965).

[65] The majority was composed of Commissioners Bartley, Johnson, and Wadsworth, the latter generally categorized as a moderate or a conservative. The sole dissenting member of the Commission was Robert E. Lee. Chairman Hyde abstained, apparently because he was unable to decide the difficult case. 16 F.C.C.2d at 23. Commissioner Cox did not participate and Commissioner H. Rex Lee was absent.

policy was a case involving a challenge by three applicants against the renewal applicant, WHDH, which sought a regular three-year renewal at the end of a four-month initial grant which it had received because of its efforts to subvert the Commission's procedures.[66]

Refusing to consider any non-comparative factors except WHDH's failure to report a de facto change in control,[67] the Commission granted the competing applicants preferences on integration and diversification,[68] since WHDH is owned in common with two Boston radio stations and a major Boston newspaper. With regard to proposed programming, the majority found no substantial differences between the various proposals, but did accord the winner a slight demerit for its "insufficiently supported local live programming proposal." [69] The Commission's decision on these criteria was certainly not startling or unpredictable. The novelty of the decision lay in its application of the *Policy Statement's* treatment of broadcast record to a renewal applicant. The majority ruled that the *Hearst-Wabash Valley* doctrine was no longer applicable and that a renewal applicant's past broadcast record would be considered only if it showed unusual attention to the public's needs. As WHDH's record had been found by the hearing examiner to be favorable but not exceptional, the majority concluded that no consideration could be given to it. Lacking a preference on any of the criteria, WHDH was denied renewal and the license was awarded to one of the challengers.

Thus the revolutionary aspect of the *WHDH* decision is that a renewal applicant's past record will be disregarded if it is "within the bounds of average performance." In such a case, he will be subject to evaluation on the comparative hearing factors without any preference over other parties due to his past record or present ownership of the station in question.

Professor Jaffe [70] and many members of the communications bar, however, believe that the interpretation of the *Policy Statement* in *WHDH* reduces the major comparative criteria to integration of ownership and management, and diversification of the media of mass com-

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[66] The head of WHDH, Mr. Choate, had attempted to influence a member of the Commission in the original licensing proceeding. WHDH, Inc., 33 F.C.C. 449 (1962).

[67] The major noncomparative issue with which Commissioner Bartley refused to deal was whether Mr. Choate's ex parte contacts were to be treated as a factor in the hearing even though he had died in 1963. 16 F.C.C.2d at 7.

[68] The majority noted in reference to the diversification criterion that WHDH had withheld broadcast of news to permit its sister newspaper to get a "scoop." WHDH also refrained from broadcasting editorials to avoid the risk of expressing views similar to those of its other media interests, thereby emphasizing the effect of its control of several media in Boston. The Commission found that this was contrary to its policy of encouraging licensees to editorialize. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[69] The winning challenger proposed to devote 36.3% of his broadcast time to local live programming. The Commission found this to be so far in excess of that of any network station that it required substantiating evidence which the challenger could not supply. 16 F.C.C.2d at 16.

[70] Jaffe, *supra* note 51.

munications. Admittedly, that element is emphasized throughout Commissioner Bartley's opinion for the three-man majority. But the Jaffe interpretation places the cart before the horse.

The majority in *WHDH* never repudiated the basic assumption underlying the *Hearst-Wabash Valley* principle: that a broadcaster's past record is the best indication of his future performance. On the contrary, Commissioner Bartley explicitly stated his agreement with that assumption.[71] Where the majority parted company with *Hearst, Wabash Valley,* and the hearing examiner's decision was on the weight to be accorded an *average* record of performance.

> Our basic disagreement with the examiner's conclusions lies in the preferred status which he gave to WHDH "not because it is an applicant for renewal but because it has an operating record and its very existence as a functioning, manned station to advance against its opponents, whose promises, after all, are as yet just so much talk." . . .
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> . . . [T]hat record is meaningful in the comparative context only if it exceeds the bounds of average performance. We believe that this approach is sound, for otherwise new applicants competing with a renewal applicant would be placed at a disadvantage if the renewal applicant entered the contest with a built-in lead arising from the fact that it has a record as an operating station. More importantly, the public interest is better served when the foundations for determining the best practicable service, as between a renewal and new applicant, are more nearly equal at their outset.[72]

The majority's reasoning is much more compelling than the hearing examiner's interpretation and application of the *Hearst-Wabash Valley* principle. Since the ultimate objective of the comparative hearing is to determine which applicant can best serve the public interest and since all applicants who are in the running can presumably provide satisfactory service, a renewal applicant's record indicates he can better serve the public interest only if it is substantially above the level of performance which the Commission regards as satisfactory. Any challenger who is below this level will presumably be eliminated.

Furthermore, the reasoning of the majority comports with the District of Columbia Circuit Court of Appeals's decisions dealing with comparative hearings in which a renewal applicant was a party. In both *South Florida Television Corp. v. FCC* [73] and *Community Broadcasting Corp. v. FCC* [74] the court expressed a concern that a renewal

[71] 16 F.C.C.2d at 9.

[72] 16 F.C.C.2d at 8-10.

[73] 349 F.2d 971 (D.C. Cir. 1965), *cert. denied,* 382 U.S. 987 (1966).

[74] 363 F.2d 717 (D.C. Cir. 1966).

applicant not receive an advantage for having operated a station under a four-month license. The court was not faced, however, with the problem of considering whether according weight to a past broadcast *record* was an unfair advantage, since the Commission had given little value to the past broadcast record criterion under the circumstances. But the Commission had given preferences to both renewal applicants for broadcast *experience*, which was a separate criterion prior to the *Policy Statement*. The majority in *South Florida* considered the preference not unfair to the competing applicants although part of the applicant's broadcast experience considered was his four months of operation under the short-term license. Judge Wright in dissent condemned the advantage accorded renewal applicants, citing *Hearst* and *Wabash Valley*, and termed such special treatment of renewal applicants a clear violation of the Communications Act.[75] In a virtually identical case a year later, a unanimous court, including Judge Wright, again affirmed the Commission's choice of the renewal applicant but on much different grounds.[76] It reasoned that the preference for broadcast experience could be justified because the renewal applicant had suffered through a decade-long initial licensing proceeding which had been aborted by the actions of its competitors and not by its own wrongdoing. The court thus concluded that the Commission's sense of fairness might reasonably give recognition to the renewal applicant's long battle for the original license and the hardship of undergoing the comparative hearing to which competing applicants were virtually invited because the initial licensing proceeding had ended in an award by default.[77] This reasoning was completely inapplicable in the *WHDH* case since there the party most responsible for the frustration of the original licensing hearings was WHDH itself. What was applicable in *WHDH* was the basic

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> The effect of the Commission's ruling here, and its prior rulings [citing *Wabash Valley* and *Hearst*] giving a preferential position to license holders, is in derogation of the congressional command and apparently is responsible for the private sales of television stations in urban areas running into millions of dollars.

349 F.2d at 973.

[76] Using somewhat cryptic language, the court apparently recognized that the Commission had given the renewal applicant in *South Florida* an unfair preference because it was a renewal applicant:

> [In *South Florida*] it seems clear that the Commission counted, in the licensee's broadcast experience, the experience representing the operation of the station under the license for which a renewal was sought. In its opinion the Commission, in addressing itself to the category of broadcast experience, described the two principal owners and operators of the licensee as having "an impressive background of broadcast experience, also encompassing operation of a television station in the Miami area." This last could only have referred to the operation under the four-months license. In its brief, appellant in *South Florida* pointed this out, and argued that the Commission had acted unfairly in taking it into consideration. Thus it is that some ambiguity attaches to the court's statement in *South Florida* that in none of the categories other than broadcast *performance* was the licensee "given an unfair advantage by virtue of being a license renewal applicant."

363 F.2d at 721, n.6.

[77] 363 F.2d at 721-22.

principle expressed in the opinions of all the judges in the two cases—that the renewal applicant cannot be accorded an unfair advantage because of the mere fact of his prior operation of the station.

Unlike the court of appeals cases, in *WHDH* the question was presented how this principle should be applied where there was a broadcast record. WHDH had a record made under a temporary authorization that could not be dismissed, as could its four-month license term, on the grounds that its operation under the inevitable threat of challenge was not indicative of its future performance.[78] *WHDH* is thus a reasonable attempt by the Commission to make use of the evidentiary value of a broadcast record while avoiding giving a renewal applicant an automatic preference merely because he is the present licensee.

B. *The Propriety of Evaluating a Broadcast Record*

The majority's approach to the issue of past broadcast record requires the Commission to evaluate that record, at least to determine whether it falls in the category of average. Professor Jaffe notes not only that such an evaluation is difficult but also that it raises the fundamental question of the propriety of any official rating of performance.[79] But since the past record is the best available indicator of future performance, the difficulty of rating the record should not be taken as a reason for refusing to consider it at all. Nonetheless, this difficulty does mean that the Commission ought to limit itself to establishing general standards with respect to those aspects of past performance that will be accorded predominant weight in future decisions. The standards must be general since they must be applicable to all cases and must avoid limiting the options available to the licensee in his efforts to provide the best service to his community. They should not accord appreciable weight to minor gradations in performance which reflect mere variations in judgment.

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[78] Four-month initial licenses have been granted by the Commission when it considered that the conduct of some or all of the parties to the licensing proceedings frustrated the purpose of the proceedings. The short-term grant is viewed by the licensee and potential applicants as an invitation by the Commission to competing applicants to challenge the licensee upon the expiration of the initial license. *See* WHDH, Inc., 16 F.C.C.2d 29, 233 (1969) (initial decision of Hearing Examiner Herbert Sharfman). Consequently, licensees under a short-term initial license have a great incentive to build up an impressive broadcast record. For that very reason, the Commission has generally accorded little weight to broadcast records made under short-term grants.

However, a temporary authorization to provide broadcast service to a community pending the outcome of a comparative hearing provides considerably less incentive. The broadcast record compiled under the temporary authorization will not be considered in the selection of the licensee in the absence of gross misconduct. Therefore, in a subsequent renewal hearing, a broadcast record made under a temporary authorization should have an evidentiary value comparable to a record made under a regular license. Since WHDH had broadcast for five years under a temporary authorization, the hearing examiner attached considerable weight to WHDH's broadcast record. Thus, the Commission was compelled to face the issue it had avoided in *South Florida* and *Community*.

[79] Jaffe, *supra* note 51, at 1697-98.

The formula promulgated in the *Policy Statement* and applied in *WHDH*—"unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs" [80]—complies with these minimum requirements. But it leaves a major problem unresolved. The broadcasting industry was stung by the *WHDH* decision, not just because of a temperamental hostility to competition, but because of the real and urgent threat such competition presents to the industry's economic security in the context of a regulatory process which has notoriously failed to establish clear standards on which reliance proportional to the size of the investment could be placed. Before *WHDH* the problem did not exist. Investment was protected because there was no real competition at renewal time. *WHDH* has created a pressing need for clarity, consistency, and predictability in the Commission's standards. One way to achieve this is for the Commission to elaborate such improved standards on a case-by-case basis. The alternative is to attack the problem on a broader front either by Commission rulemaking or congressional legislation.

Official rating of performance presents two problems. The first is constitutional, but is the less serious of the two in light of the Supreme Court's unanimous decision in *Red Lion v. FCC*.[81] In perhaps the most important decision ever handed down in the field of communications, Justice White held:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[82]

The language of the opinion reaches far beyond the limited scope of the "fairness doctrine" then under consideration, for the Court asserted that the public has a right of access to social, political, moral, esthetic, and other ideas.[83] That right could be enforced by conditioning the renewal of licenses on a willingness to present views of representatives of the community, and on fulfilling an affirmative obligation to deal with the problems that affect the people in the licensee's community.[84] In the view of the FCC's general counsel, there is now no doubt that the Commission can require a broadcaster to devote a certain amount of his programming to news, public affairs, and non-entertainment programming.[85]

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[80] 1 F.C.C.2d 393, 398 (1965).
[81] 395 U.S. 367 (1969).
[82] *Id.* at 389.
[83] *Id.* at 390.
[84] *Id.* at 394.
[85] *See* BROADCASTING, Sept. 15, 1969 at 34-35.

Although an evaluation of past performance must obviously deal with the broadcaster's product—his programming—it need not judge the quality of program content, except in the case of gross deficiencies. The primary factor to be considered in evaluating a broadcaster's record is the amount and breakdown of the time allocated to the presentation of programs dealing with matters of concern to his audience. The present classification of program types provides the foundation for such an evaluation.[86] The subject matter of individual programs may be considered to determine whether the licensee is actually presenting programming for all major elements of his viewing audience, or whether one or a few elements are catered to at the expense of the others. Gross quality deficiencies in program production should be considered in this evaluation since very low quality may negative what would otherwise be a preference for program allocation.[87]

The other problem is that any process of evaluation by a regulatory body, especially the FCC, may induce stifling uniformity.[88] Evidence of this danger is found in the proposals of applicants for an initial license and to a lesser extent in the programming proposals of renewal applicants.[89] However, since many licensees devote very little time to non-entertainment programming,[90] uniformity, insofar as it would increase the amount of such time, would be an improvement.[91] Furthermore, a measure of uniformity is the inevitable price of securing that predictability in the comparative hearing process the present absence of which is a major reason for the industry's objections to *WHDH*.[92]

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[86] *See* note 31 *supra.*

[87] *See* Irion, *FCC Criteria for Evaluating Competing Applicants,* 43 MINN. L. REV. 479, 493 (1959).

[88] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 400 (1965) (dissenting statement of Commissioner Hyde).

[89] *See* text accompanying notes 37-40 *supra.*

[90] A 1967 study showed that of the 5,643 licensees which responded to the questionnaire, 513 had no news or public service programming (497 others failed to answer the question); 1,338 had 10 hours or less a week; 1,883 had 10 to 21 hours a week. Over 900 devoted less than an hour a week to locally originated news and public affairs programs (again 497 failed to answer the question). STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE SENATE COMM. ON COMMERCE, 90TH CONG., 2D SESS., REPORT ON THE FAIRNESS DOCTRINE 98-99 (Comm. Print 1968).

[91] Definite standards as to the amount of commercialization and non-entertainment programming may also protect the broadcasters from themselves. Examiner Donahue in *KHJ-TV* concluded that General Tire would never operate a good public interest station without rules establishing standards of air-time utilization because of General Tire's obligations to its shareholders. RKO General, Inc. (KHJ-TV), 16 P & F RADIO REG. 2d 1181, 1271 (1969), (initial decision of Hearing Examiner Thomas H. Donahue).

[92] The comparative hearing process is inherently difficult to administer because of the number of criteria which must be considered, the absence of a burden of proof on the ultimate issue, and the difficulty of balancing slight preferences and demerits of the several parties on different criteria. In addition most of the parties are usually well-qualified and the Commission often shifts its emphasis on the various policy objectives. The result is that the process frequently seems more chaotic than rational. *See* JONES at A112.

C. *The* Policy Statement *in Comparative Hearings Involving Renewal Applicants*

A major problem concerning the application of the *Policy Statement* to renewal applicants remains to be considered. The fact must be recognized that there are important differences between a comparative hearing to which a renewal applicant is a party and a regular initial licensing proceeding. The differences, however, are not so great that the policy of *WHDH* must be restricted to the facts of that unique case. Rather, with modifications which take into account the differences in the evidence presented in a renewal case and the impact of the use of competing applications on the broadcasting industry, the *Policy Statement* as interpreted in *WHDH* can provide the basis for the rational development of a policy for handling comparative hearings involving renewal applicants.

The two principal policy objectives of the comparative hearing process according to the *Policy Statement* are "the best practicable service to the public" and "a maximum diffusion of control of the media of mass communications." [93] All but one of the comparative factors enumerated in the *Policy Statement*—integration of ownership and management, proposed program service, past broadcast record, efficient use of the frequency, character—are directed toward determining the applicant most likely to provide the best service to the public. The other comparative factor—diversification of control—is directed toward diffusing control of mass communications media.

In determining which applicant will provide the best public service, the most reliable indicator is the renewal applicant's record of performance. That record demonstrates how well the renewal applicant has, and therefore presumably will, serve the public whereas the other criteria establish less solid inferences that an applicant will render a certain level of public service. Even for this purpose the usefulness of the criteria is questionable in view of the absence of any empirical evidence to support several of the inferences derived from them.[94] Therefore, especially since the outcome of the comparative hearing depends to a considerable degree on the credibility of the parties' proposals, the past broadcast record of a renewal applicant will tend to be the most important criterion in the comparative hearing.

To a significant degree, the renewal applicant's past record will also be relevant to the decisions on the other criteria. Certainly, an exceptional broadcast record would be determinative on the criterion of proposed programming since the Commission can legitimately infer that the renewal applicant's proposed programming will not differ significantly from his past programming. With regard to the integration criterion, for which the Commission considers the involvement of the owner of the station in the day-to-day management, the record tends

[93] 1 F.C.C.2d 393, 394 (1965).

[94] *See* Jaffe, *supra* note 51, at 1696-97.

to demonstrate the licensee's sensitivity to the needs of his community—one of the objectives of the integration criterion. With regard to the second objective of the integration criterion, that legal responsibility reside in the persons who actually operate the station, the Commission should examine the renewal applicant's past operation to determine if the lack of integration has impeded compliance with FCC rules or the effective operation of the station. Even the criterion of character will be judged to some extent on the licensee's past relations with the Commission and its conformity with FCC rules. Thus, assuming that the renewal applicant with an outstanding broadcast record has not been derelict in meeting its legal responsibility to the Commission, it should have a preference on the proposed programming criterion, and the integration criterion should receive only minimal consideration.

The one criterion on which a renewal applicant with an outstanding record is likely to have the greatest disadvantage, diversification, involves issues of widespread significance.[95] The fact is that, with the approval of the FCC, control of communications media in the major markets has become concentrated in the hands of a relatively few persons and corporations.[96] Were the Commission to hold that even a licensee with an outstanding broadcast record could be ousted for less than a monopolistic concentration of control, the effect would be to compel divestiture of a multitude of valuable broadcast and newspaper properties throughout the nation. The adoption of a policy with such a widespread impact and possibly unforeseen consequences should be left to the Commission's rule-making power. A rule such as that proposed by the Justice Department, which would compel licensees with other broadcast and newspaper interests in a market to divest themselves of all but one of their properties, would allow all multimedia owners to minimize their losses and not just those who sold before they were challenged by a competing applicant.[97] Furthermore, a rule-making would eliminate the uncertainty of case-by-case determination of the degree of concentration that would override favorable decisions on the other criteria.[98] At least in situations where the renewal applicant has demonstrated a record of outstanding service to the com-

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[95] Of the over 150 VHF stations in the 50 largest markets, less than 10% are owned by entities that do not own other media interests. Johnson, *The Media Barons and the Public Interest: An FCC Commissioner's Warning,* ATLANTIC MONTHLY June 1968, at 43, 48.

[96] Twenty group owners, many of which also own newspaper chains, own almost half of the television stations in the top 50 markets. Trask, *The Palace of Humbug—A Study of FCC Policies Relating to Group Ownership of Television Stations,* 22 FED. COMM. B.J. 185, 199 (1968).

[97] Comments of the United States Department of Justice (brief submitted in rulemaking), *In re* Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's rules relating to multiple ownership of standard, FM, and television broadcast stations, No. 18110 (F.C.C., proposed March 28, 1968).

[98] *See* Comment, *The Federal Communications Commission and Comparative Broadcast Hearings:* WHDH *as a Case Study in Changing Standards,* 10 B.C. IND. & COMM. L. REV. 943, 968 (1969).

munity, it seems only fair to permit the licensee to sell the station since the reason for his loss of license is not his own failure but that of the Commission in granting the license in the first place.

The renewal applicant who brings a worse-than-average record to a comparative hearing, on the other hand, should be at a severe disadvantage even if he is the manager of the station, proposes spectacular programming, and owns no interest in any other media. Any other applicant who can persuade the Commission that he will satisfactorily perform should have a preference.

The most difficult case involves the licensee whose broadcast record is only average. In such a situation, the licensee's past broadcast record is not determinative. The Commission is therefore limited to a comparison of the applicants on the standard comparative criteria. Admittedly, comparing renewal applicants and challengers is something like comparing apples and oranges. The credibility of the renewal applicant's proposals is limited by his past performance. He must stand or fall on his record made in the rough and tumble of the competitive business world. That record will be marred by real inadequacies, errors in judgment, and complaints from listeners he was not able to satisfy. Deficiencies can be found in the record of even an outstanding broadcaster. On the other hand, a challenger can make his proposals secure in the knowledge that there is no record to impeach his credibility.

The Commission is aware of this difficulty. The challenger's programming proposals presumably will be scrutinized to determine their practicality, the probability of implementation, and their relationship with the needs of the community.[99] Such proposals may not, under the *Policy Statement*, be accorded a preference unless they show "a superior devotion to public service," such as unusual attention to community affairs.[100]

It seems probable that in many cases the only major difference between the parties will involve diversification. As noted above, the problem of concentration of control of the media is better handled by rulemaking than case-by-case adjudication. In the absence of a rule, it is likely that the Commission would follow the approach used in *WHDH*: analysis of the degree of concentration in a market and its effect on the station's past operation.[101] Certainly, where there is evidence that common ownership of different media adversely affected the licensee's service to the public, as the Commission found in *WHDH*, there is sufficient reason to accord the diversification factor considerable weight.[102] Here again, making diversification the determining factor in

[99] The Commission, in fact, did this in *WHDH* and gave one of the challengers a demerit for its failure to provide evidence establishing the plausibility of its proposed high percentage of local live programming. WHDH, Inc., 16 F.C.C.2d 7, 16 (1969).

[100] 1 F.C.C.2d 393, 397 (1965).

[101] 16 F.C.C.2d at 12-13.

[102] *See* note 68 *supra*.

cases where no such evidence is presented is tantamount to penalizing the licensee for the mistake of the Commission. Thus, in the absence of a rule, diversification should not be considered an important criterion. This is especially so where the degree of concentration is relatively small, for instance, where a television and a radio station in the same market are owned in common.

In conclusion, renewal applicants in comparative hearings who demonstrate broadcast records sufficiently above average to be considered should have an insurmountable advantage. However, those with records substantially below average should be vulnerable to attack by any satisfactory challenger. The scope of the comparative hearing in both instances should thus be reduced to the single issue of the caliber of the licensee's past performance.

Only where the renewal applicant's record is merely average and therefore not to be taken as determinative, should he be exposed to the other comparative criteria as was *WHDH*. The Commission should be somewhat skeptical of "paper" programming proposals of challengers, as it was in *WHDH*; in evaluating renewal applicants, it should look behind the integration criterion as it failed to do in *WHDH*. Even in a close case, small differences in diversification, not involving substantial control of the community media by any party, should not be determinative, unless a policy change is announced in a rulemaking proceeding.

The future course of FCC decisions may not conform to this pattern. But, however *WHDH* is interpreted, many applications have been and will be "filed on top" of renewal applications on the basis of the policy enunciated by Commissioner Bartley. In view of the low level of meaningful programming today, the policy of *WHDH* has revolutionary potential.

III. The Congressional Response: The Pastore Bill

A. *The Development of the Conflict*

The irony of the decision in *WHDH* is that the Commission's "desperate and spasmodic lurch to 'the left' " [103] may ultimately result in an irremediable congressional turn to the right. Even before the Commission had acted on the parties' motions for reconsideration in *WHDH*, the broadcasters' lobby had garnered considerable support for a major amendment of the Communications Act to make licensees virtually unassailable by competing applicants. By the first week in August, Senator Pastore's subcommittee on communications was already conducting hearings on his own version of what the industry termed the "anti-strike" [104] bill.

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[103] Jaffe, WHDH: *The FCC and Broadcasting License Renewals,* 82 Harv. L. Rev. 1693, 1700 (1969).

[104] "Anti-strike" is a complete misnomer. It refers to "strike applications," those filed without any intention of operating a station, but solely to prevent another applicant from getting a license without a hearing. *See* notes 123 & 124 *infra* & accompanying text.

However, a combination of circumstances and events may have eroded the momentum of the broadcasters' campaign and raised doubts among many congressmen about the wisdom of the proposed amendment. The August hearings before the Senate subcommittee were shortened because of the ABM debate and the Senate's August recess. Other pressing business forced postponement of the hearings which had been tentatively scheduled to reconvene in the middle of September. Meanwhile, opponents of the bill have revealed serious deficiencies in the industry's programming and demonstrated its frequent unresponsiveness to the needs of important and sizable segments of its audience. That RKO General could operate, with the FCC's apparent blessing, a VHF channel in the second most lucrative market in the country, which devoted nearly ninety percent of its time to entertainment (primarily old movies),[105] shocked even persons close to the industry. A recent study evaluating the programming of thirty-two television stations in Maryland, Virginia, West Virginia, and the District of Columbia demonstrated that some of the stations in major markets were deficient by any standard.[106] The most blatant example is WMAL-TV in Washington, owned by the Evening Star Newspaper Company; it ranked 25th out of 32 in the study, whereas its three VHF competitors led all other stations in the region.[107]

During this period Negro organizations and leaders throughout the country joined in a movement to improve programming. In Texarkana, Texas, several Negro groups together with the city's Chamber of Commerce filed a petition to deny the license of KTAL-TV, contending among other things that the station was not responsive to the needs of the black community. Fearing a long hearing on the petition, the station made an agreement with the protesting groups to reform its programming and meet regularly with representatives of community organizations.[108] WMAL-TV in Washington is also the object of a petition to deny by a group of black residents, and an organization named BEST (Black Efforts for Soul in Television) has recently been created to obtain programming more meaningful to Negro and other minority groups.[109] Such activity by minority groups lends support to the opponents of the Pastore bill who claim that it will prevent any change in current programming, especially on television,

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[105] RKO General, Inc. (KHJ-TV), 16 P & F RADIO REG. 2d 1181, 1194 (1969) (initial decision of Hearing Examiner Thomas H. Donahue).

[106] INSTITUTE FOR POLICY STUDIES, TELEVISION TODAY: THE END OF COMMUNICATION AND THE DEATH OF COMMUNITY 119-20 (1969).

[107] *Id.* 111-13, 125-26.

[108] KCMC, Inc. (KTAL-TV), 16 P & F RADIO REG. 2d 1067 (1969). The Commission unanimously supported the renewal grant, despite the fact that it felt serious issues had been raised by the petition, because it sought to encourage licensees to settle complaints of local broadcast service with community groups.

[109] BROADCASTING, Sept. 8, 1969, at 25.

which caters almost exclusively to the white, middle-class, segment of the audience.[110]

It is ironic that Vice President Agnew, proclaiming himself the spokesman of the middle class, may have also caused conservative supporters of the bill to have second thoughts. In a nationally televised speech, the Vice President denounced the "biased" reporting of the networks.[111] Although the speech was precipitated by the critical remarks of network commentators after President Nixon's address on the Vietnam War, the Vice President expressed concern about the unchecked power of the three networks to influence the American people. Surprisingly, he used much of the rhetoric generally associated with Commissioner Johnson, whom the broadcasters view as the ultra-liberal of the FCC.

The implications of Mr. Agnew's speech for the Pastore bill are manifold. Those who support Mr. Agnew's views should recognize that the networks own only fifteen of the hundreds of stations on which the networks' news and views are aired. Relatively few of these non-network stations devote any significant amount of time to news analysis (as distinguished from news reporting), controversial discussion, or editorials.[112] Yet, the political and social views of many of the owners and managers of the network affiliates are different from those of the network news commentators. Thus, much of the power of persuasion that the Vice President attributed to the networks is due to the failure of affiliated stations to meet their obligation as licensees: to present differing points of view on important issues. Consequently, the Pastore bill would not only protect the networks, who are regulated only through their owned-and-operated stations, but would also eliminate any incentive for affiliated stations to present points of view different from those of the networks.

Those who feel that the Vice President's remarks point out a threat to freedom of thought and expression, and therefore support the Pastore bill on the ground that it protects that freedom,[113] should recognize that passage of the bill will mean that neither the public nor the FCC will ever be able to induce broadcasters to present programs dealing with thought-provoking issues. Freedom of thought and ex-

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[110] Stavins, *Public Interest: Old and New,* in TELEVISION TODAY, *supra* note 106, at 70, 87.

[111] N.Y. Times, Nov. 14, 1969, at 1, col. 2. For the text of the speech see *id.* 24.

[112] A Congressional report found that almost half of the commercial television stations responding to its questionnaire had never carried editorials even though the Commission has for two decades encouraged editorializing. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Only about a quarter of the stations responding carried editorials on a regular basis.

Public access to the airwaves was apparently more restricted. Less than 10% of the stations had an "open mike" program which is the easiest and most popular method of presenting different points of view on important issues. STAFF OF SUBCOMM. ON COMMUNICATIONS OF SENATE COMM. ON COMMERCE, 90TH CONG. 2D SESS., FAIRNESS DOCTRINE 141-360 (Comm. Print 1968).

[113] *See* N.Y. Times, Nov. 20, 1969, at 26, col. 5 (remarks of Senator Pastore).

pression means little in broadcasting if broadcast time is devoted almost exclusively to movies, situation comedies, detective stories, and games.

B. *The Pastore Bill and Its Rationale*

The Pastore bill which is creating so much controversy provides:

> That section 309(a) [of the Communications Act of 1934] shall be amended by adding the following after the final sentence thereof: "Notwithstanding any other provision of the Act, the Commission, in acting upon any application for renewal of a broadcast license filed under section 308, may not consider the application of any other person for the facilities for which renewal is sought. If the Commission finds upon the record and representations of the licensee that the public interest, convenience, and necessity has been and would be served thereby, it shall grant the renewal application. If the Commission determines after a hearing that a grant of the application of a renewal applicant would not be in the public interest, convenience, and necessity, it shall deny such application, and applications for construction permits by other parties may then be accepted, pursuant to section 308, for the broadcast service previously licensed to the renewal applicant whose renewal was denied." [114]

The bill is premised on the assumption that security of investment among the broadcasting industry will ultimately benefit the public.[115] Considering the immense investment by licensees in equipment, facilities, programming, and personnel, this undoubtedly is an important aspect of the renewal challenge issue. The facts demonstrate that a large initial investment is necessary to enter the television broadcasting field. Whether the licensee receives the initial license for the station or purchases it, he may not recover his investment for many years, depending on the type of broadcast facility he operates and the market in which it is located. Furthermore, merely maintaining a competitive station requires that he invest in modern equipment and improve his facilities. Three years is frequently not enough to carry out major expansion or technological improvements. Long-term contracts are necessary to attract and keep experienced, talented personnel. Programming must be planned and purchased years in advance. The possibility of losing a license every three years would have a drastic impact on the ability of broadcasters to obtain capital and credit. It would probably induce many licensees to diversify for their own security. At the same time,

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[114] S.2004, 91st Cong., 1st Sess. (1969).

[115] *Cf.* Transcript of Proceedings, vol. 1, at 22-30, *Hearings on S.2004 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969) (testimony of Frank P. Fogarty) [hereinafter cited as *Hearings on S.2004*].

the insecurity would inhibit experimentation and nonprofitable programming.[116]

These factual generalizations, however, present only one side of the picture. Broadcasting also yields a high return on investment. The average VHF station recovered over 64% of its depreciated cost in 1967 alone,[117] one of television's least profitable years.[118] Recovery of investment can be much more rapid. For example, WCBS-TV in New York recovered 2,290 per cent of its total investment in tangible broadcast property in 1955 alone.[119] The average VHF station recovers its investment in a license period and makes a handsome profit besides.[120] Many stations, notably network affiliates in top markets, earn even more. Thus, security of investment is somewhat less important than it appears at first glance, especially in the more attractive and lucrative markets, where challenges are most likely.[121]

Furthermore, there are ways of minimizing the losses of the displaced licensee. The FCC could require victorious applicants to pay a reasonable price for the station's facilities[122] and assume some, if not all, of its long-term obligations.

Another possible financial burden which the *WHDH* policy presents is the "strike application." "Strike application" is industry jargon for an application filed with no intent to operate the station but for the sole purpose of forcing the licensee to "buy off" the strike applicant to

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116 *Id.* 25-30.

117 Computed from FCC Statistics. 34 FCC ANN. REP. 122, 126 (1968).

118 According to FCC statistics the VHF stations recovered approximately 84% of their depreciated investment in tangible broadcast properties in 1966 and 94% in 1965. 33 FCC ANN. REP. 173, 176 (1967); 32 FCC ANN. REP. 125, 126 (1966).

119 *Hearings on Monopoly Problems in Regulated Industries Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary,* 84th Cong., 2d Sess., 3352 (1957).

120 Earl K. Moore representing the National Citizens Committee for Broadcasting testified that the average television station recovers its depreciated investment twice over with a reasonable return besides in a license term. Transcript of Proceedings, vol. 3, at 255, *Hearings on S.2004.*

121 The only broadcasters who might suffer any great loss from the adoption of the *WHDH* policy are those who purchased stations within a few years prior to the *WHDH* decision. Undoubtedly the bulk of the purchase price was for expected profits over the next few years in anticipation of the continuance of the Commission's automatic renewal policy. *See* note 56 *supra.* If a substantial number of broadcasters in the major markets were in this situation, there might be a good reason to find a way to minimize their losses in the event that they were ousted by a challenger. The statistics show, however, that the chances of a challenge to a station which has not been able to recover its full purchase price are small. Forty-three VHF stations, out of 157 in the 50 largest markets, have been purchased by the present owner since the beginning of 1957. Of these only 8 will have had less than 6 years to recover the purchase price when they are next vulnerable to challenge. Two of the 8 stations will have had 4 years, and the other 6 will have had 5 years. This does not include the period of operation during the comparative hearings and the court appeals, which together will probably run 3 to 5 years and possibly more. Statistics compiled from TELEVISION FACTBOOK (STATIONS VOLUME) (1968-69).

122 Determining the reasonable or market value of broadcast facilities should not be difficult in view of fact that the industry currently has a market through so-called "station dealers." Victorious applicants should only be required to pay for tangible property and not for the value of the license, which is often the major portion of the sale price of a station. *See* note 56 *supra.*

avoid a hearing. Under current FCC rules and procedures "strike applications" are extremely unlikely. The Commission has established exacting standards with which all initial applicants must comply before they are considered for a comparative hearing.[123] Furthermore, the FCC's regulations require complete disclosure of any compensation paid or promised for the withdrawal of an application,[124] and impose penalties for violation of such regulations. These prophylactic measures still do not prevent the filing of a legitimate competing application against a licensee with an exceptional record, and forcing him through a long and expensive comparative hearing in which the challenger has little chance of victory. But the enormous expense of preparing an application, making the required surveys, and contesting a case,[125] is likely to deter aplications against licensees who have excellent records. Competing applications are much more likely to be filed against licensees with records that will be disregarded in the comparative hearing under the *WHDH* policy.

A second major reason for the Pastore bill is a lack of confidence in the comparative hearing process. Both the Commission and the process have been severely criticized by experts on administrative law for years.[126] Despite a multitude of precedents and the guidelines set forth in the Commission's policy statements, a party to a comparative hearing can never safely predict how much weight will be accorded to particular evidence or criteria. Professor Jones concluded his analysis of the comparative hearing by observing that there is "a degree of uncertainty and unpredictability that is probably unsurpassed in any other decisional context." [127] It is easy to understand the fears of those

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[123] Applicants for construction permits must give evidence of:

(1) financial ability;

(2) serious intent;

(3) community involvement.

The FCC also requires submission of complete engineering, programming, staffing and budgeting plans. FCC Form 301.

[124] 47 C.F.R. § 1.525(c)(1)(1969). If consideration was paid or promised, the parties involved must file affidavits disclosing:

a) the exact nature of any compensation paid or promised;

b) which party initiated negotiations;

c) a summary of the history of the negotiations;

d) why the arrangement is in public interest;

e) a justification of the consideration paid or promised.

47 C.F.R. § 1.525(a) (1969).

[125] The New York Times estimated that the cost of challenging a licensee by a competitive application was at least $250,000. N.Y. Times, April 27, 1969, § 1, at 72, col. 5.

[126] *See, e.g.*, JONES, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION, (1962), reprinted in *Hearings on the Federal Communications Commission, Before Subcomm. No. 6 of House Select Comm. on Small Business*, 89th Cong., 2d Sess., A87, A105-12, A165, (1966) [hereinafter cited as JONES]; LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, 53-54 (1960); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055 (1962); Levin, *Regulatory Efficiency, Reform and the FCC*, 50 GEO. L.J. 1 (1961).

[127] JONES, at A112.

skeptical of the Commission's ability to balance the "paper" proposals of a challenger against the performance of an operating broadcaster.[128] This does not mean, however, that the comparative hearing process should be eliminated. Many of the faults of the comparative hearing might be eliminated by the promulgation of more definite standards.

C. *A Critique of the Pastore Bill*

Even if the policy set forth in *WHDH* has certain undesirable aspects, eliminating that policy would not necessarily improve the broadcasting regulation system or the quality of programming. Several considerations support the conclusion that enactment of the Pastore bill would diminish the likelihood of the development of effective regulation, and virtually eliminate the strongest potential incentive for licensees to improve programming.

The present renewal process is one of the most ineffective regulatory devices imaginable. This is principally due to three factors: the FCC's small staff, the inability of representatives of the listening public adequately to present their grievances to the Commission, and the reluctance of the Commission to set and enforce minimal standards. *WHDH*'s policy of encouraging renewal applications would help to remedy all of these problems. Heavy commitments of funds and personnel are required to monitor stations,[129] to survey the needs and problems of the community, to develop imaginative programming to meet the needs of the viewing audience, and to ascertain what programming is practical on a certain station in a particular market. The value of broadcast licenses, especially in the more lucrative markets, would make expenditures of this type by competing applicants worthwhile. Furthermore, potential competing applicants would be induced to seek out representatives of groups which feel that a local station or stations are not adequately meeting their needs, thereby giving representatives of the public a voice before the Commission that they have previously been frequently denied.[130] Finally, the very fact that the Commission is obliged under present law to hold a hearing and render a decision when a competing application is filed would force it into a more active role in the renewal process and would put added pressure on it to establish more definite standards for programming and station operation.

Encouraging competing applications could also provide a stimulus for licensees to improve service to local communities, consult with local

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[128] *See* Transcript of Proceedings, vol. 1, at 61-62, *Hearings on S.2004* (Testimony of Morton H. Wilner, President, Federal Communications Bar Ass'n).

[129] In the case against WLBT, the protesters hired a team of 17 persons to monitor the station's programming and public service announcements. Considerable time was also spent determining the racial composition of the groups mentioned in the public service announcements to determine if the station discriminated against nonwhite groups. Transcript of Proceedings, vol. 3, at 314, *Hearings on S.2004* (testimony of Earl K. Moore).

[130] *See* notes 46-47 *supra* & accompanying text.

groups and local leaders, and adopt better programming.[131] The threat of competition might even induce profit-motivated broadcasters to consider the "public interest" ahead of the desires of their advertisers.[132]

Admittedly, the Pastore bill would not completely immunize the licensee from challenge at renewal time. But the only procedure available to a group which desires to replace the licensee would be so long, complicated, and expensive that the economic incentive which lies at the heart of "regulation by competing application" would be greatly diminished. Instead of proceeding through one hearing before the Commission and a possible court appeal, the challenger under the Pastore proposal would have to go through a hearing and probable court appeal on his petition to deny. If he were able to demonstrate that renewal was not in the public interest, the challenger could apply for a construction permit, proceed through a probable comparative hearing and a second court appeal, and then possibly obtain the license. As if this more complicated procedure were not sufficient to deter most competing applicants, the Pastore bill places certain additional obstacles in the challenger's path.

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131 Perhaps the greatest benefit to be derived from the *WHDH* policy is not that some existing broadcasters will be replaced but rather that all broadcasters will be induced to remedy deficiencies that local community groups find in their operation and programming before the groups go to the Commission or a competing application is filed based on the groups' complaints. By this means much can be accomplished without the trouble of seeking the Commission's aid. *See* KCMC, Inc. (KTAL-TV), 16 P & F RADIO REG. 2d 1067 (1969).

132 In addition, the *WHDH* policy would tend to lessen the present competitive business disadvantage of licensees who are fulfilling their obligations to their communities, usually at a sacrifice of potential profits and ratings, while their competitors ignore their responsibilities. The inequities of the present situation in the broadcasting industry can perhaps be best illustrated by reference to the record of a daytime-only station which was recently discussed in *Terre Haute Broadcasting Corp.*, 16 P & F RADIO REG. 2d 757 (1969) (initial decision of Hearing Examiner David I. Kraushaar). The station was acquired by a husband and wife only six years ago. As the sole daytime-only station in the market, it was probably at a competitive disadvantage from the outset. The licensee, finding that local news was not being adequately developed by the primary news media in the area (a television station and newspaper owned in common) increased its reporting staff and commenced a news format including in-depth analysis of local events and problems. Within a few years, the licensee was able to devote 1/3 of his programming to news, to inaugurate daily "open mike" and interview programs and sponsor guest editorials. When the city was without any local newspaper due to a strike, the licensee altered its programming to become a virtual "newspaper of the air" with additional news programs, classified ads, stock market reports, theater schedules, and obituaries.

One wonders how many other broadcasters respond to the needs of the community, risking substantial investments and loss of advertising revenue, to receive only an expedited license renewal every three years and a preference if they are ever involved in a comparative hearing for another license.

The history of the Pacifica stations' bouts with the FCC, however, demonstrates that the presentation of controversial views on local and national issues may jeopardize even these small rewards. Pacifica's orientation toward the presentation of controversy has thus far resulted in a lengthy deferral, Pacifica Foundation, 36 F.C.C. 147 (1964), a petition to revoke its licensee, United Federation of Teachers, 17 F.C.C.2d 204 (1969), and extensive opposition to its application for a license in Washington, D.C. In these cases, Pacifica, which is mainly supported by its listeners, has stood alone without any aid from the broadcasting industry at the same time that the industry was spending huge sums of money fighting the FCC's attempt to regulate commercials and its personal attack rule as abridgements of first amendment rights. United Federation of Teachers, 17 F.C.C.2d 204, 210 (1969) (separate statement of Commissioner Johnson).

The amendment appears to effect a shift in both the standard and the burden of proof which the Commission must follow. The present statutory language makes an affirmative determination that renewal *would* be in the public interest a prerequisite to the granting of the application,[133] thereby implying that if the Commission is unable to make that affirmative finding it should deny renewal. The amendment first directs the Commission to examine the licensee's record and representations. At this point it can only grant renewal if it is able to make a finding that renewal *would* be in the public interest. If it cannot make such a finding, or if there is a substantial and material question of fact, the amendment, read in conjunction with the present statute,[134] directs the Commission to hold a hearing. The language of the amendment with regard to the hearing is limited to telling the Commission what it should do if it determines that renewal *would not* be in the public interest: it must deny renewal. The amendment does not say what the Commission should do if it is unable to make this finding at the hearing. The answer must be either that it grants a full three-year renewal (despite the fact that it has not been able to make a determination that this would be in the public interest) or that it grants renewal for a limited term, hoping that a clearer determination can be made when the matter comes up again for consideration at the end of the short term. In either event, the licensee keeps his license until the Commission is able to make an affirmative determination that renewal would not be in the public interest. And, since the only person likely to bring adverse evidence necessary to support such a determination is a party opposing the licensee, the burden of proof has apparently been shifted. The licensee has been relieved of the burden of justifying his tenure.

Perhaps this feature of the bill is attributable to poor draftsmanship. Considering the degree of influence that the NAB exerted in drafting the amendment,[135] however, it is hard not to suspect that the wording was inserted to protect licensees not only from competing applications but from petitions to deny. It is less certain that this was the intention of Senator Pastore or the other supporters of the bill in Congress. However, even if the bill is interpreted as merely eliminating the present practice of accepting competing applications, there are other serious objections to it.

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133 47 U.S.C. § 309(a) (1964). Even if the Commission grants a short-term renewal, it must first make an affirmative determination that the renewal would serve "the public interest, convenience, and necessity." 47 U. S. C. § 307(d) (1964).

134 47 U.S.C. § 309(e) (1964).

135 The NAB suggested the "precise legal language" of the bill in letters to its legislative liaison members. BROADCASTING, April 21, 1969, at 60.

The clause "upon the record and representations of the licensee," which may be intended to exclude the diversification criterion from the Commission's consideration, was not included in the NAB's draft of the bill. See note 3 *supra* and text accompanying note 114 *supra*. The other difference between the Pastore bill and the NAB draft is that the former states that the Commission "shall" deny the renewal if renewal would not be in the public interest whereas the NAB version uses the word "may."

The petition to deny is a much less effective means of challenge than the competing application. At the outset, a petitioner must face a substantial burden of demonstrating in his petition that he has standing as a party in interest and that a renewal grant would be prima facie inconsistent with the public interest.[136] Moreover, in a hearing on a petition to deny the Commission has no means of determining whether another person is available who could render better service to the public in that community. The issue whether the renewal applicant will serve the public interest is substantially different from the question whether he will serve the public interest better than anyone else.[137] Because, under the Pastore bill, the Commission would have no means of knowing whether other qualified applicants were available in that community,[138] it would find it difficult not to accept mediocre programming as in the public interest. In order to deny a renewal application in such a situation the Commission would almost have to make the determination that the complete loss of that station to the community for an indeterminate length of time would be better than having the present licensee continue.[139] Obviously, the Commission is reluctant to deny a community a broadcast facility even for a short period of time unless the station's operation is atrocious. Senator Pastore seemed to recognize that the standard of performance required of a renewal applicant under his bill would be extremely low when he observed that for a renewal applicant whose application was denied to submit an application in the subsequent initial licensing proceedings would be "an exercise in futility." [140]

Thus, the Pastore bill, in its endeavor to promote security in the broadcasting industry and to avoid irrational decision-making, would

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136 47 U.S.C. § 309(d) (1964).

137 Two decades of experience with the present transfer procedure demonstrate that the standard of "public interest" is substantially lower where consideration is limited to one buyer than when anyone can be considered. Since 1952, the FCC has been prohibited from considering other applications when a licensee desires to sell its station to another. The sole issue before the Commission is whether the sale to the particular transferee would be in the public interest. 47 U.S.C. § 310(b) (1964). This loophole in the law has time and again permitted parties who would have no chance in a comparative hearing to purchase the license from the winner of the hearing. This procedure has enabled large group owners to acquire the most lucrative stations in the major markets at the same time that the Commission has been emphasizing diversification in comparative hearings.

138 The Commission could probably assume that acceptable applicants would be available for VHF and some AM stations in the top ten markets. As to other markets and as to UHF and FM stations, the Commission would have to speculate.

As in some recent cases, the party filing a petition to deny might indicate whether he would apply for the station if the license were denied. However, the Commission would still not know if the petitioner would meet even the FCC's minimal qualifications or if he could render better service than the licensee.

139 If a license renewal were denied, the community would be denied the service of that station until a replacement was selected, or at least until the applicants could commence a cooperative operation—perhaps months or even years later. If the FCC required the licensee who had already been deemed unsuitable to operate the station for the interim period, the station's operation would undoubtedly deteriorate from the level already found inadequate.

140 Transcript of Proceedings, vol. 2, at 143, *Hearings on S.2004.*

have the effect of protecting licensees rendering mediocre service and eliminating the most powerful available incentive for better broadcasting.

IV. Conclusion: An Alternative to Protection of Mediocrity

Unfortunately, the present political battle over the Pastore bill may obscure the genuine need to examine the Commission's procedures for comparative hearings involving renewal applicants. The sequence of events since *WHDH* has resulted in a "do or die" confrontation between the two sides. The industry did not foresee any major opposition to its legislative proposal. To many busy Congressmen seeking to remain in the good graces of their constituents in the broadcasting industry, it appeared to be only a minor amendment to overrule an irrational FCC decision. By the time that the opponents of the bill had rallied enough support to fight effectively against it, hearings had already begun before a Senate subcommittee which overwhelmingly favored the bill. Thus the immediate and pressing concern of the opponents of the bill was to defeat it. On the other hand, the proponents of the bill, fearing that its defeat might be interpreted as Congressional approval of the *WHDH* decision, have tended to concentrate all their efforts on securing its passage. Development of a viable Commission procedure has thus necessarily taken second place with both the bill's opponents and proponents. Hopefully the Congressional hearings will focus on more constructive legislation. This Comment offers a proposal to meet the problem posed by *WHDH*—excessive insecurity in the broadcasting industry resulting from exposure of renewal applicants to comparative hearings in the absence of reliable standards.[141]

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[141] A legislative alternative to the Pastore bill has been proposed in *The FCC and Broadcasting License Renewals: Perspectives on* WHDH, 36 U. Chi. L. Rev. 854, 876-82 (1969). The author proposes that the license term be extended to six years, but that challenges be permitted after the first three years of the term. If, in the mid-term comparative hearing, the challenger were considered superior to the licensee, the Commission would advise the licensee of his comparative weaknesses and allow him three years to correct them. The challenger could compete again in a comparative hearing with the licensee after the three year "probationary period" but he would not be permitted to alter his application for the better. If in the second comparative hearing the challenger was still considered superior, he would be granted the license.

The proposal is noteworthy if only because it recognizes two of the major difficulties with the *WHDH* policy: the unnecessary insecurity to the broadcaster and the absence of standards by which he can guide his performance. However, in so far as it deals with the crucial element of performance, the proposal virtually immunizes the licensee from the threat of loss of license and thereby deters competing applicants. Unless the challenged licensee lacked the financial resources, which would be extremely unlikely among the larger stations in the major markets, he would outperform the challenger's proposals in the three-year "probationary period" even if he had to incur a substantial loss. Afterwards, when the threat was removed, he would be free to relapse into his old ways. Furthermore, the tremendous expense of two comparative hearings and court appeals, not to mention the long delay between the initial challenge and the final award of the license, would be a great obstacle to competing applicants. Even if the licensee held a virtual monopoly of the mass media in a city, he could probably sell the license to the challenger at a handsome price because of the tremendous obstacles facing the challenger in the FCC proceedings.

The proposal is based on certain assumptions which are reasonable if not empirically demonstrable. First, reasonable competition among licensees and between them and potential applicants to provide service to their community is in the interest of the viewing public. Second, it makes sense to utilize competing applications to help the Commission determine which licensees are not fulfilling their obligations to their communities. Third, the public interest is better served by displacing stations providing poorer service than by displacing those providing better service.[142] Fourth, a renewal applicant should be judged primarily on his past broadcast record unless other factors would warrant Commission consideration in the absence of a competing application. Fifth, the standards for evaluating past performance of a renewal applicant must be as definite as possible to protect him from detrimental reliance, surprise, and irrational decision-making.[143]

Under the proposal, the comparative hearing procedure would be divided into two parts in cases involving renewal applicants. The initial issue before both the hearing examiner and the Commission would be solely whether the renewal applicant has demonstrated by his past performance an unusual attention to the needs and interests of the public. Although the competing applicant's proposals would not be considered in this initial phase of the proceeding, he would be a full party to it and would have the right to introduce evidence bearing on the adequacy of the renewal applicant's past performance. The initial determination of the level of the renewal applicant's record would be made by a comparison with other similar[144] stations in the market.[145] If the renewal

[142] Although this assumption seems to be too obvious to require mention, an argument can be made that the displacement of the best stations in a market by competing applicants better serves the public interest than the displacement of the worst stations. The argument has two parts. First, the best performing station sets the level of performance for all stations in the market. Thus, by raising the level of performance of the best station, the overall performance level of all stations will be improved. Second, competing applicants which challenge badly performing stations will propose programming which will be similar to or not significantly above the caliber of programming of the average stations in the market, since it is in the challenger's self-interest not to promise more than is necessary to obtain the license.

The validity of these contentions is open to considerable doubt as general propositions, although they may be true in particular circumstances. However, even if the argument is correct, it seems totally nonsensical to build a competitive system in which the best performers are those most likely to lose their licenses. Other means are available to induce stations to raise the level of their performance such as the ranking system outlined in the proposal.

[143] *See* text accompanying notes 127 & 128 *supra.*

As a political fact, definite standards are necessary in comparative hearings involving renewal applicants if the Commission is to function effectively. Nothing would bring Congressional pressure to bear on the Commission faster than irrational decisions in which renewal applicants were ousted. And, if history is a reliable indicator of the future, the possibility of some unsupportable decisions must be considered and guarded against by the Commission itself.

[144] The comparison should be between stations of similar types—VHF, UHF, AM, or FM. Furthermore, stations with unique problems or in unique circumstances should not be considered in the comparison. For example, a year-old station that is in financial straits should not be compared with well-established, prosperous ones.

[145] The FCC in its financial reports has designated which stations are in each market for at least the top 100 markets. Because all licenses in a state expire on the same date, current data on stations in the particular market would be available to the

applicant ranked in the top third of the comparable stations in the market under the FCC ranking system (discussed below [146]), the burden of proof would be on the competing applicant to demonstrate that the station's ranking did not accurately indicate its past performance, or that factors [147] other than past performance were so important that they must be considered before renewing the license. If the renewal applicant ranked in the bottom two-thirds of the stations in its market, the renewal applicant would have the burden of demonstrating that it had in fact rendered better service than any other station in the market.[148] The hearing examiner's decision on the past performance issue would be appealable by either party to the Commission. If the Commission found that the renewal applicant ranked in the top third of the stations in its market and that a grant of the renewal would be in the public interest,[149] the Commission would renew the license.[150] If, on the other hand, the Commission found that the renewal applicant had not demonstrated an exceptional record of performance compared with the other

Commission, except in the few situations in which the market encompasses different states.

[146] *See* text accompanying notes 155-159 *infra.*

[147] Issues relating to the public interest determination, but not encompassed in the past broadcast record criterion, should also be designated for hearing at this stage. These issues might include allegations of false advertising, deliberate slanting or staging of the news, racial discrimination in employment, anticompetitive business practices, and failure to comply with Commission regulations and procedures, to mention only a few. Resolution of these noncomparative issues at an early stage may avoid a long hearing process, particularly if the Commission finds that the renewal applicant should be disqualified as a party for violation of an FCC regulation or policy. Demerits for any conclusion adverse to the renewal applicant on a noncomparative issue obviously should be weighed in selecting the best applicant in the second phase of the hearing.

[148] Any rating system can provide only a superficial analysis of the past performance of stations in a market. And even that analysis may be incorrect because the information from which the ratings are compiled is incorrect. Therefore, the renewal applicant must be allowed to demonstrate that those aspects of its past broadcast record on which it was superior to the other stations in the market, and which were not considered in the ratings, are important and should be considered by the Commission in determining whether the licensee's past performance was exceptional. In this manner, gross differences in quality of programming between stations and in responsiveness to the needs of the community can be introduced into the evaluation of the licensee's past performance. Also, the parties to the hearing should be permitted to show that the information on which the rating was based is incorrect.

[149] An affirmative finding that renewal would be in the public interest would still be required so that stations with high ratings which had violated FCC policies or regulations, or concerning which there were unresolved questions of fact, would not be automatically renewed.

[150] The proposal is similar to the proposal of Lawrence Grossman before the Pastore Subcommittee, except that the Grossman plan would require the hearing examiner to hold a full comparative hearing even if he found the licensee's performance to be outstanding. *See* Transcript of Proceedings, vol. 3, at 394-95, *Hearings on S.2004.* The difficulties of the Grossman proposal are two-fold. First, consideration of the standard comparative issues after a licensee has shown a record of unusual attention to the needs of the community may well be a waste of time and money. Second, licensees would fear that the Commission might look beyond the issue of the licensee's past performance and consider evidence on other comparative criteria contained in the hearing record in making its determination on the past performance issue. This difficulty might not turn out to be serious, but the proposal in the text would at least provide a procedural safeguard against Commission consideration of evidence unrelated to past performance. It would also make judicial review considerably easier and more effective.

stations in its market or if it found that there were other unresolved issues which should be explored in a comparative hearing,[151] it would remand the case to the hearing examiner for a regular comparative hearing. If the Commission determined that the past record of performance was exceptionally poor, it would remand to the hearing examiner with the direction that he confer a demerit on the renewal applicant on the past broadcast record criterion. On remand, the hearing examiner would not consider the criterion of past broadcast record unless it had been found to be exceptionally poor. The renewal applicant would be permitted, however, to introduce evidence of its past programming to demonstrate the practicality and credibility of its proposed programming. It would also have an opportunity to use its record to demonstrate that the separation of ownership from day-to-day control had not adversely affected the station's operation and performance. If the competing applicant were granted the license, it would be required to purchase the ex-licensee's facilities for the fair market value of the tangible property and to assume some of the long-term obligations as the Commission required.[152]

The two-step hearing process recognizes that the best indicator of future performance is the renewal applicant's broadcast record, but that it should only be given significance if that record is exceptionally good or exceptionally poor. If the record is exceptionally good, there is little reason to subject the licensee to a comparative hearing. Not only would it probably be fruitless, but, in most cases, the only criteria on which a challenger could win would be integration and diversification.[153] If these criteria were determinative, there would be less reason for most licensees in the major markets to attempt to improve their programming. Their best interest would lie in making as much money as possible before they were challenged. As noted earlier,[154] it would be more rational and equitable for the Commission to deal with the concentration of control problem through its rulemaking powers by requiring divestiture, than by making it the determinative criterion in the comparative hearing.

Concededly, a competing applicant might be able to demonstrate that he would render better service than any station in a particular market. It is also possible that all the stations in a particular market

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[151] In passing upon the hearing examiner's evaluation of the renewal applicant's record of past performance, the Commission could also designate issues for hearing which had not been satisfactorily resolved in the first stage of the hearing or which had not been previously requested to be set for hearing by the parties. Permitting the parties to request that certain issues be designated for hearing half way through the hearing process might diminish the delay in the start of hearings caused by innumerable requests for the designation of issues.

[152] Beside long-term obligations associated with tangible property such as mortgages, the Commission might require that the victorious competing applicant keep the non-managerial personnel of the station and assume contracts for future programming which could be worked into the new licensee's program schedule.

[153] *See* p. 390 *supra.*

[154] *See* text accompanying notes 97-98 *supra.*

are mediocre or poor by any standard. Why, then, automatically protect one licensee in each market? First, it is assumed that the replacement of the stations in a market rendering the worst service to the public serves the public interest more than the replacement of the best stations. Second, the protection of the best licensee could act as an incentive to existing stations to compete for the top rating. Thus, assuming that most stations in the major markets would view the threat of competing applications as real, another element of competition would be injected into the regulatory scheme.

It must be recognized that the key to the rational development of the *WHDH* policy is the evolution of a definite set of standards with which to evaluate a renewal applicant's past broadcast record. The aspects of a licensee's record with which the Commission is concerned have hitherto been only vaguely defined. And the Commission has not consistently applied even these limited standards in initial licensing cases. [155] Such standards may be tolerable, although not desirable, in initial licensing cases where large investments are not at stake. But definite standards on which existing licensees can rely must be promulgated if "regulation by competing application" is to evolve into more than a haphazard method of arbitrarily alternating licensees in the top markets. The Commission has already enumerated those aspects of past performance which it considers important in its renewal application form and in its various policy statements.[156] It is suggested that at least until the Commission can develop a better set of standards to serve as an adequate basis for prediction, it enumerate the quantitative criteria it deems most important in evaluating a record of past performance, and indicate the relative weight it attributes to those criteria,[157] thereby providing a frame of reference by which broadcasters in a market can be compared.[158] Such a quantitative comparison of stations would elim-

[155] *See* notes 126 & 127 *supra* & accompanying text.

[156] *See, e.g.*, Public Notice Relating to Ascertainment of Community Needs by Broadcast Applicants (FCC 68-847), 33 Fed. Reg. 12113, 13 P & F RADIO REG. 2d 1903 (1968); Report and Statement of Policy Re: Commission En Banc Programming Inquiry (FCC 60-970), 25 Fed. Reg. 7291, 20 P & F RADIO REG. 1902 (1960); Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[157] Since some aspects of a renewal applicant's record are more important in determining the level of his past performance than others, a high rating on one might be given twice the weight in the final computation that is given to other aspects of the record. Also, certain programs within each category could be weighted more heavily than others. For example, an hour of non-entertainment programming in prime time might be given the weight of two hours of non-prime time programming.

[158] The rating system envisioned is similar to that employed by the INSTITUTE FOR POLICY STUDIES IN TELEVISION TODAY: THE END OF COMMUNICATION AND THE DEATH OF COMMUNITY, 94-198 (1969), and by Commissioner Johnson in Renewal of Radio and Television Licenses in New York and New Jersey, 18 F.C.C.2d 268 (1969), except that the comparison would be limited to a market and would not encompass an entire state or region.

The most complete analysis of station performance is contained in the Institute for Policy Studies (IPS) report. It ranked the 32 television stations in the Maryland-Virginia-West Virginia-District of Columbia region in two ways: performance during the composite week in 1969, and improvement in performance from 1963 to 1969. The former ranking was compiled by rating each station in nine categories: percentage of news programming, percentage of public affairs programming, percentage of entertain-

inate the major difficulty in setting and implementing standards—determining what will be deemed above average.

Of course, quantitative standards are poor measures of performance, except to the extent that a low amount of non-entertainment programming demonstrates that even if all such programs are of excellent quality, the broadcast record should not be deemed exceptional. But even if quantitative standards would not show whether the licensee played the game well, it would at least indicate whether he played the game.[159]

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ment programming (the higher the percentage, the lower the rank), the percentage of locally-oriented programming, the hours of locally-originated prime time programming, the ratio of local and regional news to total news, the ratio of news employees to total employees, the number of public service announcements, and the percentage of 60 minute segments with over 12 minutes of commercials. The ranking on each of these categories was then totaled and the total score normalized (stated as a percentage of the highest possible score). The IPS study also compared the normalized score with the station's 30 minute advertising rate (which was used to indicate station size).

Some of the mechanics of the IPS study have been questioned in the Resource Management Corporation report which is included in the Evening Star Broadcasting Company's Brief in Opposition to the Petition to Deny (FCC File No. BRCT-23). The major fault of the IPS study, which is based on programming classifications made by licensees on their renewal applications, is that the FCC definitions of types of programming are so vague that the same or similar programs are often classified differently by different stations. This fault could be alleviated were the Commission in subsequent cases to review licensees' classifications so that licensees would know how most network and syndicated programming should be classified and would have more definite standards by which to classify their locally-originated programs. Accurate classification is the basis of any quantitative measure of performance.

Many of the other criticisms of the IPS study by the RMC report would be met by a rating system in which only comparable stations in the particular market were compared. Since the stations would have broadcast days of similar length, it would usually make little difference whether the amount of programming was stated in total hours or as a percentage of the broadcast day. Furthermore, there would be less need to find a means of weighting performance to deal with major differences in station size. The RMC report appears to support the ranking system proposed here because, with all the adjustment it makes to eliminate the flaws in the IPS study, it still ranks WMAL-TV below every other VHF station in the Washington market by a significant margin and below all but one comparable station in the Baltimore market (one Baltimore station is considerably smaller than the other stations).

[159] If the mechanics of the ranking system were set forth in detail by the Commission and if the categories were such that necessary information for all stations in a market could be readily obtained (*e.g.*, from newspaper and *TV Guide* program listings), each station would be able to ascertain its approximate rank at any given point in time and adapt its performance accordingly. Admittedly, this alone cannot guarantee quality. But if licensees were induced to devote more of their time to other than superficial entertainment programming, other factors might induce them to improve the quality of their programming. For example, stations might be able to secure advertisers for non-entertainment programming if it were of consistently good quality and if it could be competitive with the programs of rival stations. Recently, many broadcasters have discovered that local news programming can be extremely profitable. As one trade magazine observed:

> With its high male adult viewership, appeal to high-income audiences and its "quality" image, news can command a higher per minute [advertising] rate than just about any show on the air, save football or *Laugh-In*.

TELEVISION AGE, Sept. 22, 1969, at 28. A study of 30 markets found that the most popular local news program had a higher audience rating than either the NBC or CBS network news program in 19 of the markets. *Id.* at 60.

Another factor encouraging broadcasters to present non-entertainment programming of more than mediocre quality is the "audience flow" phenomenon. Studies show that as much as 60% of a viewing audience will continue to watch the same channel after a program is over. SELDES, THE NEW MASS MEDIA: CHALLENGE TO A FREE SOCIETY 59 (1957). Thus, the larger the audience that a station or network can build

The proposed procedure is also designed to induce prospective competing applicants to bring before the Commission a much more intensive analysis of the performance of stations in a market than the FCC could undertake. The better the performance of the station challenged, the more complete that analysis would have to be, since the challenger would either have to show that a top ranking was not indicative of the licensee's performance or have to face the possibility that a licensee with a lower rating might demonstrate that the rating system was inaccurate or failed to reflect the high quality of the licensee's programming. As far as the competing applicant is concerned, the procedure alters the post-*WHDH* situation very little in practice, since most competing applicants are now analyzing the market and challenging the worst stations.[160]

Neither does the proposal change post-*WHDH* law with regard to renewal applicants who do not have superior records. A record of past performance which is not superior to that of other stations in the market certainly increases the probability that a competing applicant might be able to demonstrate that he can better serve the community. Like *WHDH*, the proposal recognizes that past performance cannot be ignored when the criterion of proposed programming is being considered. Unlike *WHDH*, the proposal permits past operation to be considered to some extent in relation to integration of ownership and management. This use of the record does not accord an average licensee an unfair advantage. It merely recognizes the fact that a licensee's programming proposals are more credible if similar to its past programming, and that a competing applicant's superiority on integration does not necessarily mean that he will operate the station more responsibly or will be more attentive to the needs and interests of his community than the renewal applicant. In one way the "average" licensee's situation would be changed. The assurance that rival stations were competing for high rankings in the market would remove some of the present disincentives to invest in improved programming. Thus,

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up before a particular program, the more valuable that program is to the advertiser. Consequently, when non-entertainment or locally-originated programs precede other programs, particularly in prime time, it is competitively advantageous for the broadcaster to present programs that are popular. Of course, popularity and quality are not synonymous. However, it is doubtful that consistently poor quality programs can build up a viewing audience. And something is to be said for the proposition that high quality is meaningless if few people watch the program.

A final factor which would induce quality programming is the likelihood that that a station which revises its programming in order to obtain the highest rating might find itself placed below another station in the market in the final rankings. Thus, the financial sacrifice involved in competing for the top ranking would be for naught unless the licensee could demonstrate to the Commission that, although it was second-best in quantity, it was far superior to the other stations in quality and meaningful programming.

160 Of the principal stations which have been challenged, most are unquestionably inferior to the other stations in their market. Thus, KHJ in Los Angeles, WNAC in Boston, and WPIX in New York, all have less non-entertainment programming than most other comparable stations in their markets.

even if its relative position in the market remained unchanged, its actual performance would improve, and it would be less vulnerable to challenge.

Cooperation between the Congress and the Commission is required to utilize the full potential of the policy of *WHDH*, not only because legislation might be required to implement the two-step procedure [161] and Commission action is necessary to establish standards, but also because, without consultation, each body is likely to frustrate the scheme of the other. The Pastore bill demonstrates how little communication there is between the Commission and Congress, and how little Congress really understands the intricacies of broadcast regulation. The Commission's history shows that it will not act until it finds itself in a crisis situation unless Congress compels it to act. This state of affairs is understandable in view of the great progress and expansion of the entire communications industry. But both the Congress and the Commission must recognize that stations, principally VHF stations, in the largest markets are today and will be for the immediate future the main source of news, information, and entertainment for the overwhelming majority of the American people.[162]

There are two possible consequences of *WHDH*—regulation by competition or automatic renewal. The choice is presently before Congress. It is a choice between continuing tolerance of mediocrity and new incentives to responsible broadcasting.

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[161] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) might be interpreted as requiring a full comparative hearing no matter how excellent the renewal applicant's performance may be. Actually, the comparative hearing was the FCC's response to the decision in *Ashbacker* requiring that when mutually exclusive applications were filed, both parties had a right to a hearing. Since the comparative hearing is the FCC's own creation, it should be able to modify the hearing procedure to further its regulatory policies, at least if both applicants are permitted to participate in the hearing.

[162] Almost 75% of all the television homes in the country are located in the top 50 markets and approximately 90% are in the top 100. Trask, *The Palace of Humbug —A Study of FCC Policies Relating to Group Ownership of Television Stations*, 22 FED. COMM. B.J. 185, 199 (1968).